S. Hrg. 100-577, Pt. 1

AUTHORIZATION LEGISLATION AND OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE
(ATTORNEY GENERAL MEESE)

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

THE DEPARTMENT OF JUSTICE AUTHORIZATION ACT FOR FISCAL YEAR 1988

FEBRUARY 4 AND MARCH 4, 1987

Serial No. J-100-1

Part 1 of 4

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
76-883 WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-16

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AUTHORIZATION LEGISLATION AND OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

WEDNESDAY, FEBRUARY 4, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Hatch, Thurmond, Simon, Heflin, Humphrey, Metzenbaum, DeConcini, Grassley, Simpson, Specter, and Leahy.

OPENING STATEMENT OF CHAIRMAN JOSEPH R. BIDEN, JR.

The **CHAIRMAN.** The hearing will come to order. General, welcome.

This is the first hearing on the authorization process, and it is also the first hearing of the newly constituted committee. I would like to make a few very brief remarks before we begin.

First, I would like to thank Senator Thurmond, and particularly his staff members, Dennis Shedd and Duke Short and Mark Goodin, for making this transition possible. They have done everything possible to make it work, and I want to publicly thank them for that. And thank you, Senator Thurmond, for your cooperation.

The second point I would like to make is that, General, there have been a number of inquiries of me by the press that, in light of our past disagreements and our continuing philosophic disagreement on some issues, whether or not this is likely to affect the way in which the Attorney General's office and the Judiciary Committee functions.

For my part, I want to assure you and everyone else that you personally, and the department generally, will be afforded every opportunity to make your case fully. And although I expect there will be disagreements, there will be no lack of civility in those disagreements.

Thirdly, although this committee has jurisdiction over some aspects of the whole Iran affair, it is my judgment and, after conferring with my colleagues, I think the collective judgment, that notwithstanding the fact that they have a right to ask you questions at this hearing and future hearings about the situation and what part you may or may not have played or the part the department may or may not have played in the entire process, I believe that the two specially constituted committees—one in the House and one in the Senate—have been delegated that authority and that responsibility. I, as chairman of the committee, have no intention of pursuing that issue until the Special Committee has completed its investigation, and only then if they have not thoroughly, in the minds of the committee, gone through what areas we otherwise would have jurisdiction over. And so this morning, for my part—and I suspect for the majority of my colleagues—that will not be an issue before the committee.

Today, the Senate Judiciary Committee opens its first hearing in the 100th Congress and will endeavor in a series of hearings to seriously examine the Justice Department's policies and programs. We undertake these oversight hearings for the purpose of considering the authorization bill for the department.

We intend to hear from not only the Attorney General, but in coming weeks from many of the bureau's heads and assistant attorneys general.

The committee has not undertaken such a comprehensive review of the department's programs since 1979. While such comprehensive hearings need not be undertaken every year, we felt that such hearings are critical now for two reasons:

First, this committee has passed an unprecedented amount of legislation under the leadership of former Chairmen Senator Kennedy and Senator Thurmond over the past 6 years to 7 years, especially in the field of narcotics control and organized crime. We feel it is necessary to determine how the resources and management of the department are being used to implement that legislation.

The second reason, General, is that concerns have been expressed about whether responsibilities of the department, especially its duties to administer our Nation's civil rights and antitrust laws, have been adequately met in recent years.

I might begin by making two points to the committee and to the Attorney General. The General and I met yesterday, and I appreciate his courtesy in taking the time to come up to meet with me, and I think we had a productive conversation. I made clear to the Attorney General, and he to me, that we seek a relationship between the department and the committee characterized by mutual respect and, maybe most importantly, candor.

First and foremost, we must seek areas where we can work together. As with Senator Thurmond and me. When I was made the ranking member, people wondered whether or not we could work, and we sat down and concluded that we should talk about what we agree on first and then what we disagree on next. I would like us to proceed that way in this new relationship, and we would like to continue it.

Indeed, I hope to expand our cooperation to include the area of judicial nominations, an area that General Meese and I discussed. And, secondly, I hope we will be candid with each other on the areas in which we are going to disagree.

Let me say only one more thing before I set the ground rules for this morning and begin the questioning. General Meese's designee, assistant John Bolton; I designated my chief counsel, Mark Gitenstein; the ranking member's designees, Duke Short the minority chief investigator and Dennis Shedd the minority chief counsel, and Senator Leahy designated John Podesta to meet yesterday and they will meet again next week to determine whether or not we the committee, and the Senate generally, can more completely fulfill our role of advice and consent. And that is to give advice, not only to determine whether or not we consent.

I believe there is a possibility to make this work more smoothly. It is my intention and the intention of my colleagues in the committee not to hold up nominees. We want to expedite as rapidly as we can qualified nominees for a total of 66 Federal vacancies now, and there will be approximately 35 to 40 new vacancies created this year. It is our intention to move swiftly but also thoroughly through the process, and I think our ability to work out some informal ground rules may expedite that process as well as increase the prospects of quality members on the bench.

Now, the way we are going to proceed is, if you will notice, we no longer have those little lights, General. You do not have to worry about that, at the suggestion of Senator Kennedy, whom most of my staff thinks is still chairman. [Laughter.]

I asked, by the way, I said, "What about the lights?" And my chief counsel said, "Well, Senator Kennedy did not want them." And I said, "Well, I understand. Did you ask me what I wanted?" He said, "Well, we did not think of that." [Laughter.]

Luckily for me, I happen to agree with Senator Kennedy on this point today, so we no longer have those lights. That does not mean you will not get notes passed to you when your 10-minute time is up. We are going to have a 10-minute rule today with the single exception of the ranking member. You will have to incorporate your opening statements in the 10-minute rule today because the Attorney General must be out of here by noon. He has a commitment to speak with a number of foreign diplomats at a longstanding obligation he has, and I told him we would try our best to honor that obligation.

What I would like to suggest is, if Senator Thurmond has an opening statement, for him to make it, and then you proceed as briefly as you are able to summarize your remarks, General. Then we will begin with the questioning.

Senator Thurmond, do you have an opening statement?

Senator THURMOND. Thank you, Mr. Chairman.

I am pleased to be here this morning as the Judiciary Committee begins hearings on the Department of Justice Authorization Act for Fiscal Year 1988.

First, I want to say that I expect to cooperate with the chairman in any way I can. He and I have had good relations while I was chairman, and I predict we will have good relations now.

As time passes, I am sure there will be some differences, but I have found him fair and cooperative. I just want to say, Mr. Chairman, it will be a pleasure to try to work with you any way I can.

The CHAIRMAN. Thank you.

OPENING STATEMENT OF SENATOR STROM THURMOND

Senator THURMOND. Our hearing today is the first for this committee during the 100th Congress, and I believe it is appropriate that the subject of our first hearing is the proposed authorization for the Justice Department.

Among the first and foremost responsibilities of the Judiciary Committee is oversight of the activities of the Justice Department. Although its budget does not comprise a large percentage of the Federal budget, we must not lose sight of the fact that among the responsibilities of this department are some of the most vital that are performed by the Federal Government.

During the 99th Congress, enactment of two major pieces of legislation greatly increased Justice Department responsibilities. The proposed budget authorization bill submitted by the Administration reflects a commitment to implementation of that legislation, the Immigration Reform and Control Act and Anti-Drug Abuse Act.

As we begin the process of reauthorization of the Department of Justice, I would like to make several general comments regarding the reauthorization process. I believe that the primary benefit of an annual authorization process is that it gives Congress the opportunity to regularly review the operation and management of the Department.

Through this review, Congress is able to assist the Department in improving the effective and efficient discharge of its responsibilities under law. Often this requires a change in law.

It is unfortunate that Congress has not passed a reauthorization bill for the Department of Justice in 8 years. During most of those years, I believe, the reauthorization process has broken down when members of Congress have attempted to use the authorization bill as a vehicle to impose policy changes on the Department.

All of us from time to time have criticisms of the policies or priorities set by an administration. Some of these criticisms relate to management or fiscal policies and are properly addressed in the authorization process. However, when purely substantive policy issues begin to be addressed in the authorization bill, the process breaks down.

As the chairman well remembers, several years ago we were able to move an authorization bill out of committee and through the Senate, only to see a controversial amendment doom the bill in the House. Our near success in that case was due to our mutual commitment to maintain a narrow focus on the content of the bill.

I believe it is possible to pass an authorization bill if we commit ourselves to avoid its use as vehicle for other substantive issues. I commend the chairman for his recognition of the importance of this legislation, and I look forward to working with him as it is considered.

We are pleased today to have with us the distinguished and able Attorney General of the United States, Edwin Meese, III. We welcome him to the committee and look forward to his presentation of the Department of Justice Authorization Act for Fiscal Year 1988.

Thank you, Mr. Chairman.

The **Chairman**. Thank you.

General.

STATEMENT OF HON. EDWIN MEESE III, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Attorney General MEESE. Thank you, Mr. Chairman, Senator Thurmond and members of the committee.

I appreciate this opportunity to discuss with you our fiscal year 1988 budget request, together with the accompanying authorization bill for the Department of Justice to which Senator Thurmond has referred.

At the outset, let me echo the statements that you and Senator Thurmond have made about cooperation. We certainly want to do everything possible on behalf of the Department to enter into the same spirit of cooperation and to facilitate the work of the committee and the relationship between the committee and the Department.

John Bolton, our Assistant Attorney General, in charge of congressional relations, and the other people who will be testifying before you, I know share that view.

Mr. Chairman, I would like to submit for the record—and I believe a copy has already been received by the committee—the formal statement. Because of time constraints, I would prefer to summarize, if I may, some of the main points in that statement.

The CHAIRMAN. Without objection, your entire statement will be placed in the record.

Attorney General MEESE. Those who choose to study our budget proposal carefully will discover that it is a carefully designed blueprint for accomplishing all of the Justice Department's many critical functions. I think we can all agree that the Department of Justice is one of those agencies that performs what might be described as core functions of government; that is, functions that indisputably belong to the Federal government and are fundamental in nature.

Inevitably, of course, we work very closely with State and local law enforcement agencies, and we are always careful to make those cooperative ventures. Through such devices as our Law Enforcement Coordinating Committees and the Organized Crime Drug Enforcement Task Forces, we have been able to work together in ways that maximize our ability to fight crime, while at the same time being very careful not to try to impose some Federal imprint in places where we do not belong.

This determination to cooperate with local law enforcement is reflected in the way we prepare our budget. An important example, I believe, is the Asset Forfeiture Program, a relatively new function in terms of its modern incarnation under which we have been able to make available large sums of money to local law enforcement agencies without hitting up the Federal taxpayer for additional funds. This is a situation where, literally, crime does pay; that is, it pays the cost of law enforcement activity through forfeited assets.

When we work together on a case and are able to seize the ill-gotten gains from a criminal after the criminal has been convicted, we share the proceeds of that crime which have been forfeited, or the property which has been used in the commission of the crime with States and local governments, who can then use the proceeds for both drug law enforcement as well as drug education and prevention.

I mention this, and I will go into some slight detail about this relationship, because I think that our attitude towards relations with State and local agencies has been a very important and evolving feature of department activity, and is also reflected in the way in which we manage our grant programs.

Since the inception of these programs, they have been intended, essentially, to be seed money, to get the ball rolling, as it were, in States and localities; to provide start-up money for programs that will be evaluated; and if local officials decide to do so, continued with local funding from that point on.

Our Federal grant programs were never intended to be sources of permanent, ongoing funding for local programs, nor should they be. There have been some who have chosen to criticize this year our proposal to curtail certain grant programs in the drug area, even though it should be clear to all that our role must be that of encouraging the development of, rather than sustaining, locally based programs to deal with drug abuse. This is particularly true because, with the limited funds available for any project, it is important that the Federal taxpayer funds go to Federal purposes.

I will have more to say about this in the formal statement that has been filed with the committee, and I am sure I will have more to say in answer to questions.

I would like to make one other general statement about our budget. It represents a very careful balancing of resources. I cannot stress this enough. We have made major changes in the organization of the Department and in the process for developing our budget so that we have a much greater participation by management of the Department, our top executives, in the formulation of our budget and in the allocation of our resources.

We have been hampered from time to time in recent years by what I call front-end loading of the Justice Department; that is, putting plenty of money up front, as it were, in investigating crimes, but too little money down the pipeline. The criminal justice system is a system. Sometimes it may not, to a greater or lesser extent, work like a system, but it is a system in the sense that what happens at one end of the system has very definite impacts on the other.

If we increase, for example, investigations, this means that prosecutions will necessarily be increased requiring more U.S. Attorneys. This will lead to more convictions, requiring additional work on the part of the marshals, and this in turn requires a great deal more prison space to put the convicted felons. So this is what I mean when I say it is important that we have a balance of funding throughout the entire system.

Our fiscal year 1988 budget is carefully balanced. It strikes the needed balance and relationship between the front-end activities and the administrative support, investigative and prosecutorial efforts, the prison construction and operation that all together form a complete criminal justice system. It also includes resources for civil litigation that can return many times the modest investment in debt collection as well as in defending against claims against the government.

Of course, as was pointed out by you, Mr. Chairman, and by Senator Thurmond, necessarily the budget also includes significant new resources to meet the increased responsibilities as a result of a variety of legislation which has been passed during the last year and during the preceding years.

Let me spend just a moment highlighting very briefly several significant aspects of recent legislation which are reflected in this budget request. The first, of course, is the Immigration Reform and Control Act. A very critical piece of legislation has been passed after preparatory efforts going back nearly 6 years. The Department is in the process of now developing the plans for implementation of this legislation, much of which takes effect the middle of this year, and it is reflected in increased amounts requested for the Immigration and Naturalization Service.

The Anti-Drug Abuse Act of 1986, of course, has a number of expanded and additional functions for the Federal government, and in this regard, we have asked for funding to carry out these particular responsibilities. I might say that a major portion of new funding is particularly necessary for the Bureau of Prisons which, in addition to a general increasing work load, has been particularly affected by the increase in convictions and the increased lengths of sentences for drug crimes.

We have also required enhanced resources for United States attorneys, the Drug Enforcement Administration and FBI, and the Marshals Service as a part of the follow-on to the Anti-Drug Abuse Act of 1986.

Another piece of legislation which will be fully implemented in the course of the next year is the program for United States Trustees, which was passed as a part of the Bankruptcy Judges, Trustees and Family Farmer Bankruptcy Act of 1986. In particular, we are looking towards a great deal of the funds being put out under this Act to be part of a self-funding mechanism, but there will be some necessary start-up costs and some initial outlays which we hope will be restored as a part of the act's self-funding mechanism once it is completely in place.

Aside from prison construction, very little of our budget goes to anything other than people costs. It is not an exaggeration to say that the Department of Justice is personnel-intensive. And as a result, other things affect our department perhaps more deeply than those departments which have a greater balance of capital expenditures and non-labor expenditures.

Thus, the recently enacted Federal Employees Retirement System Act of 1986 has had a very substantial impact on our Department's need for funding. As these provisions go into effect, we will need supplemental funding for fiscal year 1987 for this fiscal year, as well as additional amounts in fiscal year 1988. This need is particularly true in our Department because of the large number of employees who qualify for special retirement status because of their law enforcement position.

The net result of these legislative initiatives is reflected in our budget request. A year ago, I presented to this committee a budget on behalf of the Administration that asked for about $4.2 billion. When Congress completed action on that funding, largely because of the additions that were then appropriated as a part of the Anti-

Drug Abuse Act, this had grown to $4.6 billion. If our pending request for supplementals is approved, we will add another $300 million for fiscal year 1987, bringing us almost up to $5 billion. Our total request for the fiscal year 1988 appropriations is just over $5.2 billion. And if we include the activities that are self-financed, that actually would exceed $5.6 billion.

In terms of our positions, the growth is also significant. A year ago, we proposed that 64,415 permanent positions be supported from appropriated funds. The fiscal year 1988 estimate is 72,798, an increase of 13 percent. As I indicated earlier, it is largely the Administration's aggressive plan to implement the new legislation that drives this budget. Since much of this legislation will or has already become effective in fiscal year 1987, the supplemental requests for this year are closely linked to our requests for fiscal year 1988. Therefore, I would urge the Congress to appropriate the supplemental funds in order to enable us to promptly implement these important initiatives.

We are proposing the increases in the Department's fiscal year 1988 budget in the most vital areas, and this has been, really, a very careful weighing of where our resources could best be allocated.

I might point out, Mr. Chairman, and members of the committee, that I think it is significant that in the President's budget, the President recognized the essential functions of this Department and the important initiatives carrying out his policies, as well as those of the Congress, and requested the increases that I have discussed.

Obviously, as I mentioned earlier, funds will be needed for the Immigration Reform and Control Act implementation. We will also need the resources, again, as I mentioned, for funding the war against crime and particularly the war against drugs. These positions are set forth in my formal statement in more elaborate detail.

Some of the things that we need to do is to provide additional funds for the FBI in a particularly sensitive area, and that is to strengthen the FBI's counterintelligence program. We have made real strides in the course of the last 2 years in counterintelligence. Some of the news magazines called it the "Year of the Spy" because we were apprehending so many of them.

In addition to that, we have had a major reduction in the number of Soviet agents in the United States through some diplomatic steps that were taken during the past year. We do not want to lose that initiative now, and that is why we think it is essential to beef up our foreign counterintelligence effort.

In the areas of United States Attorneys, we have had a real problem not only in the criminal field, which I have already referred to, but also in the civil field. We do not get to choose who sues us. Those are decisions made by others. But we do know that the money put into a competent defense of claims against the government with the investment in personnel, yields returns manifold in terms of the money that is saved the taxpayers.

The Federal prison system, again, is a matter in which we do not control the work load. It is controlled largely by the judges who are sentencing prisoners to the Federal prison system for longer periods of time and in greater numbers. And, of course, we have the very key element of courts looking over our shoulders to make sure that prison conditions are humane and tolerable, and that involves having adequate construction resources so that the necessary cell spaces are there.

I would particularly draw the attention of the committee to my statement where it lists in some detail the plans for expanding the prison system.

The United States Trustees Program I have already mentioned, and I have also mentioned the Litigation Program. Let me mention two other areas that require funding. One is the voice privacy radio communications for our law enforcement agencies. Criminals, particularly in the drug field, who have been apprehended, have often been found to have portable scanners which are available from any Radio Shack or other radio store. Without the voice privacy devices in both the cars and in the personal radios of our law enforcement officers, we are exposing them to added risks. This problem can be handled only by a voice private radio system. We have made considerable economies in pulling together the engineering and the planning for all three law enforcement services—Marshals, DEA and the FBI—so that we can obtain these new resources at the lowest possible cost.

One aspect of our civil activities is, of course, debt collection. Debt collection is important not only because of the financial return to the Federal government and, thus, the lesser impact on taxpayers, but also we think it is important that the government be in the position of collecting its just debts and making sure that the people who do take loans or otherwise owe fines and other sums to the government recognize that they will have to pay.

One increase which should be drawn to the attention of the committee, and which I believe has already been recognized by many members, is the need to provide the necessary resources for independent counsel activities. Again, this is something which is beyond the control of the Department, and, therefore, adequate funds must be made available for that purpose.

I will not go on into any further detail, Mr. Chairman, other than to say that a very important part of the proceedings before this committee is that which Senator Thurmond referred to, and that is the authorization bill. We think it is highly desirable that an authorization bill be passed by the Congress this year. This would remedy the situation that has gone since 1979, when the last authorization bill was enacted.

Our proposal reflects a carefully balanced bill that includes a number of very important powers and authorities for the Department. We have it now before the Congress so that it is here at the beginning of your deliberations, so there should be plenty of time to look at it and to review it. And we would appreciate very much your consideration of this as a part of our systematic strategy for providing a sound statutory basis for Department activities.

The members of the Department and I will be ready not only today, but at any time that is necessary, to meet with the committee either informally or formally to assist you in what I hope will be a successful passage of the authorization bill this year. Thank you, Mr. Chairman.

[Prepared statement follows:]

Department of Justice

STATEMENT

OF

EDWIN MEESE III
ATTORNEY GENERAL

Mr. Chairman and members of the Committee:

Thank you for giving me the opportunity to discuss with you our FY 1988 budget request, together with the accompanying authorization bill for the Department of Justice.

Those who choose to study our budget proposal carefully will discover that it is a carefully-designed blueprint for accomplishing all of the Justice Department's many critical functions.

Conservatives and liberals may disagree on many things, but we all agree on the fact that the Department of Justice performs *core functions* of government - functions that indisputably belong to the federal government, and that are fundamental in nature. Inevitably, of course, we work closely with state and local law enforcement agencies, but we are always careful to make these *cooperative* ventures. Through such devices as our Law Enforcement Coordinating Committees and Organized Crime Drug Enforcement Task Forces, we work together in ways that maximize our ability to fight crime, while never trying to impose a federal imprint in places we don't belong.

This determination to cooperate with local law enforcement agencies is reflected in the way we prepare our budget. An important example is the Asset Forfeiture Program, under which we have been able to make available large sums of money to local law enforcement agencies without hitting up the federal taxpayer for the funds. When we work together on a case, and are able to seize ill-gotten gains from a criminal after he has been convicted, we share those gains with states and localities, who can then use the proceeds for both drug law enforcement and drug education and prevention.

Our attitude toward relations with state and local agencies is also reflected in the way in which we manage our grant programs. Since the inception of these programs, they have been intended to "get the ball rolling" in states and localities -- to provide seed money, start-up money for programs that will be evaluated and, if local officials decide to do so, continued with local funding later. Our grant programs were never intended to be sources of permanent, ongoing funding for local programs, nor should they be. We've taken some criticism already this year for proposing to drop certain grant programs in the drug area next year, even though it should be clear to all that our role must be that of encouraging the development of, rather than sustaining, locally-based programs to deal with drug abuse. I'll have more to say about this later in my testimony.

I'd like to make one other general statement about our budget: it represents a careful balancing of resources. I cannot stress this enough. We have been hampered from time to time in recent years by what I might call "front-end loading" of the Justice Department -- putting plenty of money "up front" in investigating crimes, but too little money farther "down the pipeline." The system becomes unbalanced when we have enough money to investigate, but not enough to prosecute when these cases come to court, or to incarcerate when convictions are obtained.

Our FY '88 budget is carefully balanced. It strikes the needed balance between the "front-end" activities and the administrative support, the investigative and prosecutorial efforts, and the prison construction and operation that form a complete criminal justice system. It also includes resources for civil litigation that can return many times the modest investment in debt collection and defending against claims against the government.

Of course, the budget also includes significant new resources to meet increased responsibilities as a result of a variety of legislation passed over the last year. Let me spend a moment highlighting several significant aspects of this recent legislation, and then I'll discuss our budget request.

IMMIGRATION REFORM AND CONTROL ACT

Enactment of the Immigration Reform and Control Act at the end of the 99th Congress imposes significant new responsibilities on the Immigration and Naturalization Service and other components of the Department. This legislation represents the most comprehensive reform of our immigration law since 1952. It takes a major step toward controlling illegal immigration while preserving the nation's proud heritage of legal immigration. The Act contains three key provisions -- employer sanctions, increased enforcement authority, and legalization.

The Department is in the process of drafting regulations that will implement this landmark legislation, and as you know, we have shared preliminary drafts of these regulations with those of you in the Congress and other interested parties. In fact, we've taken the unusual step of making these public long before our formal publication of proposed rules for comment due to take place late this month. We've done this to ensure that we receive the widest possible comment from all concerned, and we welcome any thoughts or suggestions for change that you may have.

The legalization provisions of the legislation will go far to improve the lives of millions of people who have until now lived in the shadows of our society. The legalization program will enable these men and women to step into the sunlight and ultimately, if they choose, to become citizens. The program will be financed through a special fund financed from fees collected from persons applying for temporary residence status. Because this program will provide direct and significant benefits to a select group of individuals, namely illegal aliens, we believe the beneficiaries of this program should pay the costs, not the general taxpayer.

We have already launched significant efforts to ensure that all the provisions of the Act are effective. We are in need of considerable additional resources requested in the President's budget request, in both FY 1987 and 1988, if we are to meet our new obligations.

ANTI-DRUG ABUSE ACT OF 1986

The Congress and the Reagan Administration share a determination to wage a war on drugs that represents our very best effort to rid American society of a terrible scourge. The Anti-Drug Abuse Act of 1986 and the companion Omnibus Drug Supplemental Appropriation Act, passed with bipartisan support, testify to this commitment. We are proposing increased resources to meet our very substantial responsibilities under these laws, as well as under the Comprehensive Crime Control Act of 1984.

The Anti-Drug Abuse Act of 1986 was truly a landmark measure that dramatically strengthens our ability to attack the national drug problem from both the supply and demand sides. In the enforcement area, the 1986 Act included important Administration proposals to create substantial penalties for money laundering and the manufacture and distribution of controlled substance analogues or "designer drugs." The Act also incorporates our proposals for mandatory minimum sentences for large-scale drug trafficking and strengthens drug penalties across the board. Many other important drug enforcement initiatives were also enacted in the comprehensive anti-drug legislation, including measures to strengthen the "schoolyard law," which makes it a federal offense to sell drugs within 1,000 feet of a school, toughening and improving federal asset forfeiture laws and attacking other manifestations of the drug problem.

As I mentioned, the drug penalty enhancements enacted last year generally track our own proposals in the area and reflect our view that prison is precisely where drug traffickers belong and we want their stay there to be a lengthy one. At the same time, this does have very obvious and significant budgetary implications for the Department of Justice and particularly our Bureau of Prisons.

On the demand side, the 1986 drug law includes what we believe will be an effective deterrent to use of controlled substances -- a minimum fine for simple possession of drugs and a minimum jail term for a second conviction of simple possession. This will bring home to drug users that we view drug use as a serious matter. This provision, we believe, is consistent with the greatly enhanced drug education and drug treatment programs provided for in the 1986 Act. In this area as others, however, follow-up is necessary and will require the enhanced resources which we have requested for our United States Attorneys, Drug Enforcement Administration, Federal Bureau of Investigation, U.S. Marshals Service and Bureau of Prisons, all of which devote substantial resources to drug enforcement.

In short, the 1986 Anti-Drug Abuse Act represents a true watershed in terms of drug control efforts and accounts for much of the increase in funding which we are seeking for FY 1988. Overall, our request reflects a candid priority to those areas that demonstrate a strenuous law enforcement program.

OTHER LEGISLATION

Additionally, late in the 99th Congress, the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986 was enacted. This legislation expanded the role of the United States Trustees to a nationwide status. All of the studies of the pilot version of this program, run under the auspices of the Department for the last seven years, have concluded that it has been successful, and should be extended throughout the country. The studies found that: the program significantly improved the speed and efficiency of the bankruptcy system, increased the likelihood of successfully rehabilitating debtors, and enhanced the possibility of increasing the returns to creditors. Our budget request seeks the additional resources necessary, until the Act's self-funding mechanism is completely in place, to meet the increased responsibilities that come with nationwide expansion of the program.

Aside from prison construction, very little of the Department's budget goes to anything except "people" costs. Nearly everything we do, from investigating crimes to prosecuting cases in court, from guarding the border to running prisons, is "personnel-intensive." As a result, the recently enacted Federal Employees Retirement System Act of 1986 has had a very substantial impact on the Department's need for funding. As the Act's provisions go into effect, we must seek supplemental funding for FY 1987 and additional amounts in FY 1988. The impact is disproportionately high for the Department because of the large number of our employees who qualify for special benefits because of their law enforcement status.

This year's request also reflects the growing emphasis on self-financing that derives from recent legislation. Last year, for example, the Assets Forfeiture Fund proved so productive that Congress removed many of its limitations. Similarly, the Continuing Resolution established an Immigration User Fee Account that will fund significant segments of inspection-related services in the Immigration and Naturalization Service. As I noted earlier, our budget request also includes a self-financing provision for the legalization program of the Immigration Reform and Control Act. Finally, the request continues the Crime Victims Fund financed by criminal fines and looks toward the self-financing of the U.S. Trustee program by FY 1989.

IMPACT ON DEPARTMENT RESOURCES

The net result of these initiatives, of course, is reflected in our budget request. A year ago I presented a budget on behalf of the Administration that asked for about $4.2 billion. When Congress completed action on FY 1987 funding, this had grown to $4.6 billion, largely because of the funding added to implement the Anti-Drug Abuse Act. If our pending request for supplements is approved, another $300 million would be added for FY 1987. Our total request for FY 1988 appropriations is just over $5.2 billion. If we include the activities that are self-financed, the total for the Department exceeds $5.6 billion.

In terms of positions, the growth is also significant. A year ago we proposed that 64,415 permanent positions be supported from appropriated funds. The FY 1988 estimate is 72,798, an increase of 13 percent. As I indicated earlier, it is largely the Administration's aggressive plan to implement the new legislation that drives this budget. Since much of this legislation becomes effective in FY 1987, the supplemental requests for FY 1987 are closely linked to the FY 1988 requests. I urge the Congress to appropriate swiftly the funds requested for FY 1987, to enable us to implement these important initiatives.

We are proposing increases in the Department's FY 1988 budget in the most vital areas. Let me briefly describe some of the key requested increases.

Immigration Reform and Control Act Implementation.

We are asking for $216.5 million in FY 1988 to support 4,602 positions. If we are to meet our responsibilities, we will need supplemental appropriations of $146 million in FY 1987 to fund 4,559 positions. These resources would allow us to enforce employer sanctions, launch the agricultural worker program, and strengthen the Border Patrol.

INS's FY 1988 budget includes a $29 million increase over the FY 1987 appropriations for the border patrol. The FY 1988 increase is on top of an FY 1987 supplemental increase request of $26 million for the border patrol. We are proposing to add more than 1,800 new positions to the border patrol to carry out the enforcement aspects of the Immigration Reform and Control Act of 1986. Most of these new positions will be added to the southern border. There should be some ancillary benefit to our drug interdiction efforts on the southern border as these border patrol personnel join the force already stationed there.

Funding the War Against Crime

As we respond to recent legislative initiatives, we must also continue to improve our fundamental mission in law enforcement. Last year both the President and the Congress continued to make clear that illegal drug trafficking is a serious threat to the nation's internal safety and stability and that radical responses are necessary. The level of resources devoted to the drug war continues to increase dramatically. Our FY 1988 request seeks increases totalling $63.3 million to fund 734 new positions in the drug enforcement area. For the Drug Enforcement Administration, we are requesting $24.6 million for 108 new positions to increase security for its ADP operations and for office automation activities, to establish asset removal teams at various locations throughout the country, and to augment technical and support operations. The request provides for more than 400 additional workyears for DEA's programs in investigations, intelligence, foreign operations and technical support. We are asking for 518 new FBI positions, 97 of which are specifically earmarked for the Organized Crime Drug Enforcement Task Forces and related drug enforcement activities.

These and earlier enforcement increases will generate litigation increases for the United States Attorneys due to narcotics case referrals from investigative agencies. To handle these cases, we are requesting $21.4 million for 417 new positions, including 44 positions and more than $2.5 million dedicated to Organized Crime Drug Enforcement Task Force activity in the field. Additional investigations and prosecutions inevitably increase the workload of the United States Marshals Service. The additional judicial security, prisoner handling and witness security requirements will generate the need for $8.5 million to fund 112 positions for program operations and an additional $1.7 million for the care of unsentenced prisoners held on drug charges in state and local jails. Finally, we are proposing an additional $2.7 million for the National Institute of Justice for drug-related research and education.

FBI-Criminal Division

The FY 1988 budget request for the FBI contains the fifth year of the Administration's initiative to strengthen the FBI counterintelligence program. The FBI is also increasing resources devoted to terrorism, including domestic terrorism.

We plan to devote 80 more positions, 42 special agents and 38 support personnel, to Department of Defense procurement fraud and bank fraud and embezzlement investigations. This will raise the FBI's level of personnel investigating white collar crime to more than 3,100. These people focus on federal government fraud, such as bribery or conflict of interest, on public corruption by federal, state, and local executive and management-level public officials, and financial crimes, such as bank embezzlement and fraud.

One of my top priorities has been to prosecute those responsible for Department of Defense procurement fraud. Through the investigative and prosecutorial efforts of the Department of Defense, the FBI and the Criminal Division, we are helping to restore integrity to the defense procurement process. The cases are very labor-intensive and time-consuming. But they are very rewarding. For example, on July 24, 1986, Litton Systems, Incorporated, was sentenced, following a plea of guilty, to 320 counts of false claims and mail fraud. This case, which involved mischarging material cost on contracts to the Army, Navy and Air Force, resulted in $15.7 million being paid back to the U.S. Government.

We have also been successful in prosecuting the top echelon of organized crime in this country. However, we cannot rest until we cripple the entire organized crime structure. It is estimated that organized crime reduces the GNP by $18 billion. The threat that organized crime groups present to our society strongly justifies not only our existing level of resources, but also an FY 1988 increase of 160 positions and $11 million for the FBI and 24 positions and $2 million for the Criminal Division. These new resources will primarily focus on organized crime's infiltration and domination of major national and international labor unions. Through control of these unions, La Cosa Nostra gains political and economic power and a vast source of funds from which they can finance other illegal activities. We must return control of the unions to those honest workers whom these unions represent.

United States Attorneys

In addition to the drug enforcement increases I mentioned earlier, the United States Attorneys will need new resources of $1.6 million for 28 positions to prosecute white collar criminals identified by the FBI and other agencies.

Federal Prison System

As increased resources are provided to the Department to investigate and prosecute violations of Federal law, and to the courts to conduct trials, the inevitable result is an increased Federal prison population. In 1981, the population of the Federal Prison System was 23,783. Today it is 41,500. Despite new prison construction during the past six years, the rate of overcrowding now approaches 50 percent.

We are succeeding at a task that has been our first priority for the past six years: putting dangerous criminals behind bars, and putting them there for long sentences consistent with the seriousness of their crimes and the threat they pose to society. This is especially true of those guilty of drug-related crimes, who now form a very significant proportion of our prison population. But our success at this task must be met by a willingness to construct new prison facilities, to staff them, and to keep up needed modernization and repair activities at the many prisons we now run.

The Federal Prison System already has most of the funds to complete construction of a Los Angeles Metropolitan Detention Center and Federal Correctional Institutions at Fairton, New Jersey and Marianna, Florida. We also have most of the funds needed to complete construction at Bradford, Pennsylvania; Sheridan, Oregon; Jesup, Georgia and a site not yet selected in the Northeast. We are now completing work on the Cuban detention unit at Oakdale, Louisiana and are moving ahead on lower security satellite camps and housing units.

To complete these projects and begin new ones, we are requesting new resources of $195.4 million in FY 1988. Out of this amount we will use $126.5 million to construct two Federal Correctional Institutions in the Northeast and Southeast and complete one facility in Oregon that was only partially funded in 1987. Another $33.7 million will be used to add six satellite camps or housing units at existing institutions in Kentucky, Tennessee, Alabama, Georgia, West Virginia, and Wisconsin and a new detention facility. The remaining $35.2 million will be used for modernization and repair of existing facilities.

As new facilities are completed and we move prisoners into them, we need activation funds. The FY 1988 request includes $34.5 million for the Federal Prison System Salaries and Expenses Appropriation to open up 2,328 new beds. With these and other additional resources, care and custody costs of housing Federal prisoners will reach almost

$761 million and require over 12,000 positions.

United States Trustees

We share the Congress' enthusiasm for the nationwide expansion of the United States Trustees. However, this expansion requires us to seek supplemental funding in FY 1987, if we are to accomplish our shared intent to implement the program promptly and effectively. While Congress established a United States Trustee System Fund so that oversight of bankruptcy cases would be fully funded, over the short term, receipts will simply be inadequate to launch the program. In FY 1987, a $16.4 million supplemental is requested to build up to an FY 1988 program that can provide nationwide coverage. This will require an FY 1988 appropriation of $53.5 million to support 893 positions. Beginning in FY 1989, we expect the program to be self-funded from its accumulated and current receipts.

Other Department Responsibilities

Another area that requires substantial investment is our technological capability. Among these investments is a request to spend $24.7 million to install office automation systems in the Department's major litigation and management offices. As a result of completed requirements analyses and joint planning and procurement efforts, the Department is prepared to make significant gains in FY 1988 in the replacement of obsolete equipment and the introduction of innovative office automation capabilities. In addition, we need further investment of $11.2 million in the FBI coordinated system to provide digital voice privacy radio communications among the FBI, Drug Enforcement Administration, and the Marshals Service. Also, the Department is requesting $13 million for the construction of an FBI-DEA Engineering Research facility at Quantico, Virginia.

Another area of significance is debt collection. The Federal Government must vigorously pursue judgments of the courts and other amounts owed to the Government. In FY 1986, U.S. Attorneys collected $236 million in cash from civil and criminal debts. In FY 1987 and 1988, we expect this to grow to $248 million and $270 million, respectively. The FY 1988 budget requests 80 positions and $4 million for the United States Attorneys to identify potential recoveries for fraud, abuse of Government benefits, and defaults. We are optimistic that, after a full year of operation, this small additional investment may return up to $60 million in estimated recoveries. We also intend to implement recent legislation authorizing the Department to retain private counsel for debt collection in certain pilot districts beginning in 1987. A supplemental appropriation of $2.2 million is needed to launch this program. In FY 1988, the request would grow to $2.8 million. We estimate that this investment may yield up to $91 million in addition to amounts collected by the United States Attorneys.

For the Civil Division we are seeking 34 positions and about $2.3 million to meet its increased litigation responsibilities in the Courts of Appeals and the Supreme Court. In addition, the Civil Division request includes 69 positions and $13.8 million to meet increasing workload in the torts, commercial litigation and federal programs areas. These resources will be used almost entirely for the defense of the Government in litigation and the concomitant avoidance of a significant drain on the U.S. Treasury. Our Department's litigators are currently protecting the Treasury of the United States against more than $125 billion in potential liability.

There is also a need to provide the necessary resources for Independent Counsel activities. The Continuing Resolution gave us authority to transfer $1,000,000 from other appropriations for this purpose. We have notified the Appropriations Committees of a $600,000 transfer and we are in the process of identifying a source for the remaining

$400,000. To augment these resources, the Department requests a supplemental appropriation of $2 million in FY 1987. We have not yet determined the FY 1988 request, aside from continuing the authority to transfer up to $1 million from other appropriations, but will keep Congress informed of developing requirements.

RESOURCES ADEQUATE TO THE TASK

Now I would like to address criticisms that have already been leveled at certain aspects of the President's budget request.

Immigration Reform

Some have criticized the Department because we have not requested the full $422 million authorized by the Immigration Reform and Control act for FY 1987 implementation and the $419 million authorized for FY 1988. However, we feel strongly that our budget proposals in this area fully reflect our shared commitment with the Congress to see to it that the vital purposes of the Act are accomplished. The combination of our requested appropriations and anticipated fees from the legalization program should equal $294.5 million in FY 1987 and $397.1 million in FY 1988. Given the fact that the legalization program will not begin until May 5, 1987, at which point more than half the fiscal year has passed, we believe that our proposed funding is set at a realistic level. I urge that you bear in mind that an implementation effort on this scale requires time, planning, and skill in order to put the resources on stream in an orderly manner. To spend more money than we have proposed would be to waste it.

War on Drugs

There have also been claims that the Administration's budget priorities do not reflect a true commitment to the war on drugs. This is simply not the case. Ours is not a rhetorical war on drugs. It is a real war with real people fighting -- and dying.

Last month, we buried two of our own: DEA agent Raymond

Statsney was laid to rest in Atlanta, where he had been shot and killed while working to put a major drug trafficker behind bars. Agent William Ramos was shot and killed while working on a case in Pharr, Texas. Another DEA agent, A. D. Wright, was shot and seriously wounded in a similar incident in Florida. Let no one say that our war on drugs is a war of words.

This Administration has worked hard for the past half dozen years to put our commitment and our resources where they can do the most good -- in the field, on the front lines of this war. I could cite statistics for hours that bear this out, but a few examples will make my point:

- Federal resources devoted to drug law enforcement, prevention, and treatment have tripled during this Administration. Most of the law enforcement prevention, treatment and research efforts begun in the FY 1987 drug abuse initiative are continued in the FY 1988 budget. For example, $137 million and $100 million respectively, are earmarked for prevention and education in the Departments of Education and Health and Human Services. The Department of Defense and the Veterans Administration also have resources devoted to this.
- During this Administration, in the Department of Justice alone, drug-related funding has more than tripled, growing from $365.5 million in FY 1981 to an anticipated $1.237 billion in FY 1988. At the same time, personnel workyears attributed to drug enforcement will have more than doubled from 7,332 to 14,734.
- From its start in FY 1983, the Organized Crime Drug Enforcement Task Force program has grown from 1,630 positions and $112.7 million to a requested level of 2,759 positions and $199.3 million in FY 1988 -- this represents an increase of 1,129 positions (69%) and $86.6 million (77%).

These figures demonstrate six years of sensible continuing and incremental increases and program enhancements for the war against drugs.

It's interesting that, in light of the huge increases in funding for the drug war under the Reagan Administration I've just mentioned, some are trying to suggest that we are somehow lacking in a commitment to the war on drugs. Remember that when President Reagan took office in 1981, total federal spending on fighting drugs stood at just $1 billion. In FY 1987, it will be nearly $4 billion.

Our critics charge that a drop in funding in certain areas between 1987 and 1988 somehow changes all that. But upon closer examination, a different story emerges. Some $350 million in 1987 expenditures represent one-time, major capital purchases, and these obviously require no expenditures in 1988. In addition, many of the FY '87 dollars represent one-time start-up programs, and $225 million in FY '87 money represents seed grants for states and localities that need not be repeated in FY '88. Other monies are appropriated in 1987, but intended to be spent over a two-year period. In short, the truth is that the federal role in combatting drugs has received continually increasing support over the past six years, and when it comes to federal drug enforcement, there is an additional increase from FY '87 and FY '88 of some $72 million.

We must also not overlook the fact that other resources within the Department are used to fight the drug war, even though those resources are not highlighted in the budget as drug-related. For example, almost 40 percent of the Marshals Service's total caseload is drug-related. In FY 1988, the Marshals Service will spend more than $80 million and use 1,150 staff positions on drug-related work. The U.S. Attorneys already devote more than $70 million and 1,100 people to prosecute drug criminals.

About 37 percent of our Federal prison population is incarcerated for drug-related offenses. In FY 1988, the Bureau of Prisons is devoting over 4,000 staff positions and $362 million of its resources to operate and construct institutions required to house drug offenders of which 310 positions and almost $89 million are new resources requested for FY 1988. Finally, I would like to point out that INS' 4,000 border patrol agents can now be cross-designated for drug-related cases.

STATE AND LOCAL ASSISTANCE

As in past years, we are asking for funds where we believe a core function is served. The FY 1988 request for the Office of Justice Programs is for $78.3 million, a marginally higher amount than our FY 1987 request. This will provide more resources for the National Institute of Justice and the Bureau of Justice Statistics, and provide for the maintenance of the Missing Children and Public Safety Officers' Benefits programs. Administrative support would be provided to these programs and to those scheduled for phase-out. We propose to continue full funding for travel, lodging, meals, and training expenses for state and local law enforcement officials attending programs at the FBI's National Academy and the National Institute of Corrections. As we have done in past years, we are proposing to terminate new funding in FY 1988 for the $67.6 million Juvenile Justice program, the $44.4 million State and local assistance program, the $12 million Regional Information Sharing System, and the $5 million grant program that reimburses states for housing sentenced Mariel-Cubans. The new issue in this area is the $225 million grant program that Congress initiated at the end of the 99th Congress, when it added this money to the Continuing Resolution as part of the Omnibus Drug Supplemental Appropriation Act. In response to this congressional initiative, the Office of Justice Programs has developed programs that may be useful in fighting the war against drugs. However, there is no guarantee that this grant program will yield permanent benefits. Since the full $225 million remains available until expended, I suggest that we look for positive results before we add more.

We must also remember that the Department administers a major program that signficantly assists the states financially --

the Asset Forfeiture Program. The equitable sharing of assets seized from drug dealers and others and forfeited by them is a better way for the Federal Government to assist the states and localities. When the President's FY 1988 drug budget was prepared, this form of help for states and localities was taken into account. It was important to structure the budget so that scarce federal dollars should be spent where they count the most. We want to see sharing of forfeited assets take the place of continued out-and-out grants. Sharing of responsibility and sharing of benefits is an important, cost-free way that the Federal Government has been helping the states in the drug war.

During FY 1985, the Justice Department approved the transfer of more than $2.5 million to state and local agencies under the Asset Forfeiture Program. In FY 1986, this sharing accelerated to $24.4 million. Sharing for FY 1987 is estimated at $28 million, with an FY 1988 projection for equitable sharing to top $30 million. It represents the sort of approach we should pursue with states and localities.

AUTHORIZATION BILL

Finally, last week the Department submitted its proposed FY 1988 authorization legislation. Congress has not enacted separate authorization legislation for the Department since 1979. Our proposal reflects a carefully balanced bill that includes necessary undercover authorities for our law enforcement bureaus, gift acceptance authority, authority to retain user fees and a comprehensive codification of our financial management authorities. This legislation is very important to the effective and efficient administration of the Department's operations and I urge its expeditious and favorable consideration.

The appropriations and authorization process requires a balancing of the many interests that compete for Federal resources. The Administration's proposal candidly favors programs reflecting an aggressive and effective enforcement of Federal law. We are proposing to continue to put resources -- the dollars and the manpower -- on the frontlines, in the field where they are most needed. And this is true government-wide. It is a carefully considered systematic strategy which had its beginning in 1981 and which involves rationally planned growth -- growth which recognizes the various developmental stages of the anti-drug battle and targets resources to make the best use of taxpayer dollars. Thus, our proposed budget seeks to fund all core efforts, investigation, prosecution, imprisonment, and litigation. If our commitment is true, resources in one area must be paralleled in other areas.

I would like to thank the Committee for this opportunity to present the views of the Department of Justice.

The **Chairman**. Thank you very much, General.

We will be bound by a 10-minute rule, and I will ask the staff to notify Senators when they are approaching their 10 minutes.

General, at a later time this morning, I would like to discuss the authorization process with you. I am enamored with the notion that maybe we should deal with a 2-year authorization process rather than a 1 year, but may have to get to that in terms of a written question to you.

Let me begin with something that is not fully within the purview of the authorization hearing, but it is the topic of the greatest concern of this committee at this moment. I am referring to judges.

I would like to discuss with you to what extent ideology plays a role in the Administration's decision to send up nominees. As you well know, there has been a good deal of scuttlebutt—real, genuine, correct or otherwise—about the degree to which the Administration seeks to put its imprint on the court.

Let me ask you, General, do you think it is proper to question potential nominees about their views on policy or legal issues such as affirmative action or the Equal Rights Amendment or abortion or previous nominations like the Manion nomination? We understand, and I do not know if it is true or not, from one prospective nominee that he was asked what was his view of the Manion nomination.

Again, I do not know that to be true. Can you speak to us for a few moments about what you, A, are doing as a Department; and, B, what you think the proper rationale for what you are doing is?

Attorney General **Meese**. Yes, Mr. Chairman.

Apparently, it was true in at least one previous administration that potential judges were asked detailed questions about their views on political issues and on ideological matters such as you have mentioned. That has not been true, and the directions are very clear from me, that this not be done within the Department of Justice. We are not interested in somebody's political views; we are not interested in their philosophical views on specific issues. We are particularly not interested in their views on matters that may come before them as judges of a court.

We are interested, obviously, in their views as to what their approach should be as a judge in the judicial role. We are interested in their views on such things that have been labeled "judicial activism," whether they think a judge should make the law or whether they think a judge should interpret and apply the law.

The **Chairman**. In order to flush that out, do your people ask prospective nominees whether they think rulings on certain social issues by the court have been proper, and whether or not they would change them?

Attorney General **Meese**. They do not ask the questions in that way. They ask questions as to what is their view of how a court should go about deciding issues in general. They may use examples of past cases, not as to how they would rule, but, rather, as to their views as to the process whereby those rulings were achieved and some of the constitutional and interpretive issues that are involved.

But the idea of any kind of an ideological litmus test—as I say, contrary to what has been done in past administrations—definitely is not the rule and not the case now.

The CHAIRMAN. In evaluating sitting judges as opposed to practicing attorneys, in evaluating sitting judges does the Administration research or consider whether the judge has granted defendants' motions to limit testimony or suppress evidence because of alleged violations of the fourth or fifth amendments to the Constitution? Is that a specific line of questioning?

Do you ask judges that or do you research judges' backgrounds on that?

Attorney General MEESE. To the best of my knowledge, the answer is no. Particularly, much of that would not be even available if we did want to. I know we do not ask the judges about that.

We try to get away from one side or the other. We want our judges to be fair to all sides in any controversy, whether civil or criminal. Most of the those things would be contained in trial transcripts, and we do not do that.

We do read appellate opinions that judges have written or memorandum opinions as to both the clarity and style of their writing ability, which is a factor in their intellectual and judicial capabilities, and also to see their approach to judging but not as to a specific issue.

The CHAIRMAN. So the fact that a judge may or may not have granted suppression hearings, ruled 70 or 80 percent of the time on behalf of the defendant, that is not something you either attempt to calculate or, if it came to your knowledge, you would consider as a disqualifying characteristic?

Attorney General MEESE. In general, that is correct.

Now, if a judge, for example, was granting defendants' motions or, for that matter, granting prosecution motions, a hundred percent of the time, or 90 percent of the time, that might be something that would show up either in the FBI or the Bar Association evaluation, or even in our evaluation, as reflecting upon that person's judicial ability.

But as far as taking one side or the other per se, no.

The CHAIRMAN. Well, let me pursue that point one more moment before I leave the subject.

It would seem to me that it is relevant only to the degree to which an appellate court would have determined that that particular judge has been ruling incorrectly. And I guess what I would like to ask you is to what role does the judgment about their being upheld or overruled at the appellate level have in this process? Or is it merely that, if you found out someone ruled 90 percent of the time, even though they were upheld a hundred percent of the time, that would disqualify them?

Attorney General MEESE. It would depend, again, on the circumstances because one of the things, as you know, is that if all the rulings—let us say a hundred percent of the rulings were for the defense, there would be no appeal because the prosecution rarely has the opportunity to appeal in a case, particularly if it results in acquittal. But I think, again, it would be very unlikely that that occasion would happen.

We would look at how frequently a judge was sustained on appeal or not sustained on appeal. If a person was constantly being overruled, that would be looked at not from the standpoint, again, of the issues involved, but more from the standpoint of that person's capability to be a judge or for advancement as a judge.

The CHAIRMAN. Well, would it be useful to the Attorney General's office if it was made aware of questions which exceeded the bounds that have been generally outlined by you that you wish to pursue?

Attorney General MEESE. I would be happy to learn that.

The CHAIRMAN. I do not know whether we can show you that, but I will, in light of what my impression is, determine whether or not that can be sustained. And if it is, I will pass it on to you and would ask you to act appropriately in light of your comments.

Let me move for a moment to the cuts in State and local budgets. First of all, would you explain to the committee not your rationale—you have already explained that—but the effect of the implementation of your rationale about what the Federal Government should do and what the State can do and should do?

As I understand it, the budget proposes to cut the Justice assistance authorization from $415 million in 1987 to $78 million in 1988, a decrease of $337 million. Now, the programs funded under this Justice Assistance Section are State and local narcotics control, $225 million; the Bureau of Justice Assistance, $44 million; the Juvenile Justice Program, $70 million; Regional Information Sharing, or RIS, $12 million; and caps the Victims' Fund at $35 million. So the total, as we understand it, results in a decrease in 1988—not in 1987, but in 1988—of $337 million.

First, are my figures correct?

Attorney General MEESE. Approximately, yes.

The CHAIRMAN. So how do we justify that? I mean, my impression is, General—and this puts you in a tough spot, I guess—that your department argued vigorously with OMB not to make those cuts. I would like to know your rationale again as to how we can be cutting, for example, State and local narcotics control in 1988 by $225 million?

Attorney General MEESE. Mr. Chairman, I think there are two ways of looking at it: one from the policy standpoint, and then we can go into the numbers of these individual accounts. Let me take that one first.

I think it is very important in allocating resources and in recognizing that there is a limited amount of funds available when we decide where the Federal Government ought to be spending its money. There is no doubt in my mind whatsoever that it ought to be on the Federal functions.

We are putting three times as much money in the Federal Government into the enforcement of drug laws as was there in 1980. We are increasing dramatically the amount of funds that are going to prevention, education and treatment programs over what was there in 1980.

The CHAIRMAN. But less than Congress authorized, though; correct?

Attorney General MEESE. No. I believe the money there in 1987 and 1988 is considerably—well, you are talking about the Anti-Drug Abuse Act?

The CHAIRMAN. Yes.

Attorney General MEESE. I think that it maybe less; I'm not positive. But in any event, it is considerably more than had been going into those programs when this Administration took over.

As to the $225 million, particularly, we are increasing Federal law enforcement by some $72 million in fiscal year 1988 over 1987, which was a dramatic increase over 1986. We think that is where the extra money ought to go.

The reason for this is we now have 10 to 15 percent of all Federal law enforcement devoted to combating drugs. At the local level, less than 3 percent of police resources in any city that you want to name, and a comparable low percentage of State resources, is going into the battle against drugs. We think that, if anything, there should be an increase in the percentage of law enforcement resources at the local level that is allocated to the drug battle to even be half as high as that which we are allocating at the Federal level.

Therefore, if we have to choose between the Federal Government, which does not have a responsibility in this field to give money to local governments, we think it is far better to have that money instead go into the Federal role and its effects against organized crime, interstate crime and international crime.

The CHAIRMAN. Well, my time is up. Let me just say one thing. As far as the Congress' view, and I think this is correct, we are not going to try to make you choose. We want you to do both. It is OMB and the President who are making you choose.

I yield to my colleague, Strom Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Attorney General, with regard to the judges, I presume you would not hesitate to question about judicial activism. I have received a lot of complaints over the years about Federal judges exerting too much power, taking over school districts, taking over hospitals, taking over State prisons and other State institutions.

In my opinion, this should be avoided. When I was chairman, I frequently asked the question about judicial activism. As I construe the Constitution, it is the business of the judges to interpret the law and not make the law.

Would you care to comment on that?

Attorney General MEESE. Senator Thurmond, I certainly agree with that, and I think it is very wise of this committee in questioning potential judges that these questions be asked of them, because I believe that in those judges who have been appointed by President Reagan during the past 6 years, we have seen a trend away from unconstitutional and improper judicial activism and towards judges who will interpret the law rather than try to make it.

Senator THURMOND. Mr. Attorney General, as reflected in your statement, the Justice Department recognizes a growing overcrowding problem which exists in the Federal prison system and has asked for increased funding for prison construction.

Today, as you stated, the rate of overcrowding approaches 50 percent. What impact will the funds you have requested have on the rate of overcrowding, and what do you foresee as the future needs in prison construction?

Attorney General MEESE. Senator Thurmond, if the funds that we have requested in this budget are provided by the Congress, we will materially decrease the overcrowding and head us on a trend toward what we believe is the ultimate objective; and that is, no more than 20 percent excess of rated capacity.

We now have 41,500 Federal prisoners. That, quite frankly, is about 2,500 more than was anticipated for this fiscal year just 2 years ago. We anticipate that by 1989, for fiscal year 1989, that will grow to about 44,000 prisoners, and that by 1993 we will have as many as 63,000 prisoners.

Therefore, it is vital that we continue our prison building program now, continuing the trend that we have set, that this Administration has set over the past several years, so that we will be able to reach the point where we can reduce considerably the overcrowding in our prison institutions. At some of them, it is as high as 97 percent excess capacity.

Senator THURMOND. Mr. Attorney General, in the budget proposal for the Antitrust Division, there is a reduction of about a hundred personnel slots. Does this reduction indicate a shift in the priority that the Department will place on antitrust activity, or does it simply reflect budget tightening across the board?

Attorney General MEESE. It represents budget tightening, but also it represents economies of personnel that have been obtained by increased productivity, by automation, and by other management improvements with the Antitrust Division.

We are committed to continuing the high level of antitrust enforcement which has characterized this Administration. We have been able to cut down on some of the work load, quite frankly, by our merger guidelines which enable firms that are proposing mergers to meet the requirements of the department, so as not to decrease competition, without having to go through lengthy proceedings within the department. These and other techniques have enabled us to make these modest reductions in the total personnel.

At the same time, if there should be any change, if the work load requires additional personnel, we will be eager and quick to supply them, and that is one of the reasons why we have provided in this budget that the Antitrust Division be part of the general litigation budget so that it will be much easier to transfer people into that division should the work load require it.

Senator THURMOND. Mr. Attorney General, the Department has proposed that the Antitrust Division be included in the funding for general legal activities like other litigating divisions.

I intended to ask you to please explain the need for this change. However, I believe you have explained that in your previous answer. So, I will turn to another area.

Mr. Attorney General, you mentioned in your testimony that funds have been requested for the United States Trustee Program. When does the Department anticipate that this program will become self-funding?

Attorney General MEESE. While we cannot say precisely, Senator Thurmond, we would hope that this would be accomplished within the course of this fiscal year or early in the next fiscal year. We are moving in that direction as rapidly as possible, but there is necessary initial outlays and it will take some time.

But we think that the self-funding mechanisms will be effective, and we will be working to do that as rapidly as possible.

Senator THURMOND. Mr. Attorney General, as you stated in your testimony, the Administration has again recommended termination of all funding for the Regional Information Sharing system. I continue to hear from those who believe that this program plays a vital role in State and local law enforcement efforts.

What is your assessment of the value of this program to law enforcement efforts at the State and local level, and how will this termination affect those efforts?

Attorney General MEESE. I have discussed this repeatedly with leaders of law enforcement throughout the country, and most recently with representatives of the International Association of Chiefs of Police. I think there is recognition on the part of the local chiefs—first of all, they believe this is valuable and I do, too. I think it is a valuable part of law enforcement cooperation on a regional basis.

Many of the chiefs I have talked to have admitted that they recognize this is a local expense and should be a local expense, that the Federal funds initially were provided essentially to get the equipment in place and for start-up costs. And what was originally a short-term type of project has now been extended for several years beyond what was intended when the Federal funding of these programs were originally started.

We think that the time is now for the regions, for the States that are within those regions, to pick up the cost of these information and intelligence systems, and that this could be done without an awful lot of cost on the part of any one State.

Senator THURMOND. Mr. Attorney General, the Administration has consistently recommended termination of the Juvenile Justice Program. However, Congress has just as consistently been unwilling to accept the recommendation.

Did the department consider the historical opposition of Congress to this program termination in considering its budget recommendation for fiscal year 1988?

Attorney General MEESE. We understand the views of Congress, and this is a subject on which I think that it is possible, perhaps, to work out an accommodation in the course of this year.

Again, as a matter of priorities and as a matter of what is the Federal role, this, while a very important function of local law enforcement and State law enforcement, is not really a Federal role. However, in view of the congressional attitude, I think this is something on which we might be able to sit down and work out some reasonable accommodation.

Senator THURMOND. Mr. Attorney General, my time is about up. I just have one more question.

As you testified, the Anti-Drug Abuse Act of 1986 established a program to provide grants to State and local governments for use in drug control and enforcement efforts. Under this program, $225 million will be provided to the States during fiscal year 1987. The Department has not requested any budget authority for this program for fiscal year 1988 even though it is authorized for 3 years.

If the Department sees positive results from this program during 1987, will you ask for a supplemental appropriation for 1988?

Attorney General MEESE. Senator, as I mentioned in response to the Chairman's question, we think this is a matter of priorities and where the limited Federal resources ought to be allocated. Actually, some of the funds that have been appropriated for fiscal year 1987 will actually be spent as outlays in fiscal year 1988. But we would prefer to think of these monies in terms of start-up costs for local government and, as I mentioned earlier, providing the basis for the local governments to have time to increase the percentage of their resources that are allocated to drug law enforcement.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I want to make a brief comment, establish a bit of the predicate, General, and in the tradition of our chairman, will try and be as candid as I may.

This year, we celebrate the Bicentennial of the U.S. Constitution, and in that document and the Bill of Rights, the Founders established a society based on the goals of individual liberty, equality and the rule of law. And in the two centuries since then, Congresses and Presidents have worked hard to advance the values embodied in the Constitution and make them a reality. We can be proud of the strides that we have made toward realizing the goals of the Constitution in these 200 years.

The Justice Department and the Attorney General play a crucial role in implementing these constitutional principles, and when the Justice Department drags its heels, the country suffers. I have served in the United States Senate for 24 years and, bar none, this is the most anti-civil rights administration I have ever seen.

I take note that the whole issue of civil rights was not even mentioned by the Attorney General either in his printed document or in his opening comments.

Tax credits for segregated schools, opposition to the Voting Rights Act, resistance to the Martin Luther King Holiday Bill, the assault on the Civil Rights Commission, relentless hostility to affirmative action, nomination of racists to the Federal courts. I am not accusing the Reagan Administration of being responsible for racism in our society, but I am accusing them of creating a climate that encourages discrimination or repudiates opportunity.

Howard Beach, Forsyth County are happening on your watch, Mr. Meese, and the question is: What do you intend to do about them?

In other areas as well, the Administration's record is unsatisfactory. It is appalling that the Department of Justice is now prepared to undo the bipartisan spirit of cooperation that produced the landmark opportunity for sentencing reform by encouraging the Sentencing Commission to slip the death penalty in through the back door of its deliberations.

Congress is prepared to debate the death penalty, but the tricky maneuver the department is pursuing to get in its way is, I believe, contemptible. We had the long period of time of bipartisan support. The basic spirit was to leave those items out of the whole questions in sentencing. Where there could not be a spirit of comity, the death penalty in specific was excluded in the time that we considered the recodification of the criminal code on two different times, and now you are circumventing what I consider both the letter and the spirit of the law by trying to intervene with the Sentencing Commission on this issue.

The war we just declared last October against drug abuse, I hope the Administration will stand shoulder to shoulder with the Congress in waging the battles that lie ahead. The budget you have just submitted is a signal to cut and run.

I am reminded here on the questions you talk about the particular grant programs, you talk about a 1-year authorization. The Section 302 talks about 3-year authorizations. To States and local communities, fiscal year 1987, fiscal year 1988, $230 million; $230 million fiscal year 1989. This program in State and local communities is only a few months old. My own State is already providing the matching funds.

You talk about the commitments of local communities. I submit in the record, what is happening in local communities and States across the country? Dramatic increase in the prosecution of drug cases just at the time that you are pulling the rug; pulling the rug on the State and local communities. And the idea that you are going to get some benefit from forfeiture resources is a sham. It is self-evident, I believe, in your own statement.

On the record of civil defendants, I hope the General will rethink his plan to attack the Supreme Court's decision in Miranda. The decision has worked well for 20 years, contributed to the improvement and the quality of law enforcement. There is no realistic indication that the Supreme Court is prepared to reconsider it.

I would hope that Mr. Meese and the Solicitor General would have higher priorities than to launch a quixotic effort in the waning years of the Reagan Administration to implement one of its worst relics of the right-wing agenda.

If you want to do something in terms of battling crime, I hope you will come up here and work with us. If we are going to have to just deal every week with these kinds of issues on Miranda and exclusionary and habeas corpus and death, we will. But you know that we are diverting the attention and the resources of the members of this Committee, plus the attention, I believe, of the country on something which is a vital concern to the people in our Nation.

Finally, on judicial nominations, I continue to be appalled by the Administration's record on minority and female appointments to the Federal bench. I know there are minorities and women who are eminently qualified to serve as Federal judges, and we intend to see that the department does a better job.

I am mindful, General, that when you were here for your confirmation, you stated, "If I am confirmed as Attorney General, I will make the greatest search to try and find as many qualified people from all minority groups for presentation to the President for judgeships."

However, in the 2 years that you have been Attorney General, the President has not appointed a single black, as I understand it, to the Court of Appeals out of 32 nominees, and has nominated only three blacks out of 97 District Court candidates.

Let us start out on the question of the nominations. When are you going to recommend to this Committee and to the Senate and to the American people more judges which are representative of the population as a whole?

Attorney General MEESE. Senator, let me preface my answer to this question by saying that on most of the things that you have said in your political diatribe, you are just flat wrong. But I do not have the time to go into detail, probably, to answer all of those without unduly infringing on the time for other members, but I will be happy to answer those points specifically in writing for the record because there were so many inaccuracies and misstatements of fact.

As to this particular question, it is our hope and our desire to appoint people from a broad cross-section of the American people. As you know, the appointments to the District Court, by tradition and by agreement with this committee, come from the nominations by members of the Senate. And so we are limited to the pool of those people who are nominated by your colleagues.

As far as the Court of Appeals, most of the appointments to the Court of Appeals come from the District Courts. And we are looking for a broad cross-section, and that will continue to be our quest, while at the same time carrying out the commitment I also made to get the best possible persons to recommend to the President for these appointments.

Senator KENNEDY. Well, let us just take that, then. What does it say about your party and your intervention or your influence? You take the comparison between the Reagan judicial appointees in the District and the previous Administration President Carter. That includes recommendations, evidently, by the members of the United States Senate.

And on that, in terms of Federal, District and Supreme Court, you had 9 percent women—excuse me, under President Carter, 15 percent women, 20 percent black, 22 percent blacks and Hispanics. Under your Administration, ten percent women, 1.2 percent and black and Hispanics 6.2. So in other events, this is the responsibility of the Republican Party here in the Senate. Do you want to lay the blame there, or do you want to say that you have at least some responsibility in trying to work with the members of the Senate in terms of District Court judge. Everyone understands that, General. Everyone understands that up here.

Attorney General MEESE. Senator, we do have——

Senator KENNEDY. We were not born yesterday. I have been here for the 24 years under Democrats and Republicans alike, and we all know the power of the Attorney General. Do you want to indict your party members up here? That can stand as well.

Attorney General MEESE. Well, Senator, I think you know better than that, and I think you know that this is a shared responsibility between the Senate and the Attorney General's office and the President. But as I say, the policy has been agreed that the nominations come from the Senate, from the members of the Senate. And I might say that there are a lot of reasons, demographic reasons that you could go into, one of which is probably most Senators prefer to nominate people of their own party. And I think party registration would have something to do with it as far as the particular minority groups involved.

Senator KENNEDY. Well, the point I will just end on, because my time is up, I represent Massachusetts. We have had vacancies in our own State in the District judge, and we have two Democrats and we have not been asked for a single recommendation in terms of the vacancies under this Administration.

My time is up.

The **CHAIRMAN**. Thank you. Would you like to respond to that?

Attorney General **MEESE**. No.

The **CHAIRMAN**. Senator Grassley.

Senator **THURMOND**. The 1988 Presidential race has now begun. [Laughter.]

The **CHAIRMAN**. Who is in it, Mr. Chairman? [Laughter.]

Senator **KENNEDY**. Are you going to handicap it, Strom?

The **CHAIRMAN**. No, do not do that yet, Strom.

Senator Grassley, I believe, is next.

Senator **GRASSLEY**. Thank you, Mr. Chairman.

I do have some questions, but I also want to give a little background, Mr. Attorney General. I would like to refer to the fact that 2 years ago, as background for this discussion, at a Justice Department authorization hearing like this, you and I discussed Justice's commitment to prosecuting fraud against the government.

We focused on what the Justice Department had been doing—maybe I had better wait here until we——[Laughter.]

There are a hundred Senators, but you would not know that. [Laughter.]

Anyway, at that time, we focused on what the Justice Department had been doing and how it planned to fulfill its responsibility to deter fraud against the billions of taxpayers' dollars poured into the defense industry.

Now, my charge to you at that time 2 years ago was that there was very little evidence that the Justice Department had taken seriously its responsibilities in the area, let alone fulfill those responsibilities.

I also emphasized that as the Department seeks to concentrate on its core Federal functions, no function is more core or more Federal than recovering Federal taxpayers' dollars that have been stolen away through fraud. And as you know, only Federal law enforcement officers can have jurisdiction in this area. So if the job is going to get done, it has to be done by your Department.

Now, that was the direction of our discussion 2 years ago. Last year, when you presented the Department's budget request, government fraud law enforcement was not even mentioned. This year, thank goodness, your testimony does indicate an interest in this area, as well as some increased resources to be devoted. I very much hope that this is a very positive step. Nonetheless, I have some questions about resources and how they will be used.

First, will the increased resources outlined in your budget provide adequate law enforcement in the defense fraud area?

Attorney General **MEESE**. Senator, we believe that they will. As a matter of fact, this has been a priority throughout the 2 years. Necessarily, everything that we do in the Department, even all our priorities, cannot be included in the statement that we have prepared for the committee, or it would be several times larger than it is. This does not in any way indicate a lack of priority.

Indeed, in the Department priorities, economic crime, and particularly defense fraud, are top priorities. We have expanded our economic crime activity. My own personal management time is such that I devote a great deal of time to supervising and finding out directly what goes on in the economic crime field, including defense procurement fraud. So this is an area which gets a great deal of executive attention within the Department, including my own. It is an area where the resources that we are asking for will be adequate to devote the attention to that priority which we feel it deserves. And if we find that we need more resources—and we have considerably expanded FBI resources in this area—we will see that either supplemental appropriations or reprogramming is done to accommodate it.

Senator GRASSLEY. Your answer is a basis for why I ask the question. For the past 5 or 6 years, it seems like the Justice Department has been saying that defense fraud law enforcement is a top priority, that it was being given the sufficient attention that it deserved.

From what I can see, the results have not made the kind of impact that suggests law enforcement in this area is, in fact, adequate. Legitimately, early on, you and your colleagues could say to us, "Give us time, give us time." But you and I both know that this is not a new problem.

So my next question is: How much time and how many resources are needed before we finally have effective results?

Attorney General MEESE. Senator, we think we are getting an effective result now. We think we have materially decreased the amount of fraud that is taking place in defense procurement. The strange thing about this is that the more we find, the more there is an apparent increase in fraud, because the only statistics you have are the cases that are made.

We are making more cases, and that is why there appears to be more fraud. But at the same time, we feel that the deterrent effect and the prevention activity that we are engaged in is actually having a very salutary effect on the amount of fraud.

In addition to this, a great deal of the problems are not as much direct fraud as they have been contract flexibility or contract mismanagement, much of which was inherited by this Administration. A great deal of attention is being paid to that through reorganization and executive attention within the Department of Defense. I think the combination of their preventive activity, and the work of the Department of Justice and the cooperation with the Inspector General in DOD, is having its results.

Senator GRASSLEY. I am not going to say that you do not think you are doing a good job. But I guess I would ask you to review, in light of some statistics I have, whether or not there is really the impact being made there that you suggest. I would ask that you think in terms of just the 100 largest defense contractors, and the 100 largest defense contractors happen to get about $100 billion of our defense budget.

A recent General Accounting Office study found that over the past 4 years more than 150 defense fraud cases involving the top 100 defense contractors were referred to the Department of Justice for prosecution. And the GAO found 50 of the top 100 contractors were named in one or more of these cases referred for criminal prosecution.

Now, when half of our largest defense contractors are cited in cases referred for fraud prosecution, I think that there is ample evidence that we continue to have a very serious and a very costly problem, very costly problem. Can you tell me if the Justice Department prosecuted any of the top 100 defense contractors for fraud in 1986?

Attorney General **Meese**. Senator, you are just making the point that I made. That is, the more we uncover and the more we prosecute, the more it looks like bad statistics. But actually, this is the result of our very aggressive investigation and prosecutorial activity.

I do know that we have prosecuted a number of major defense contractors, and I will be happy to reply in writing exactly what has happened to those cases that have been referred and what has occurred.

Many times, it turns out that case referrals have involved contract overcharging and other things which were the result not so much of deliberate fraud, but of misunderstandings or mismanagement by the contract officer. In these cases there is no criminal intent present. However, I would be very happy to provide you with a detailed analysis of all of the cases during the past fiscal year which were referred for prosecution and what happened.

We have had a very good record of getting convictions in those cases that were in a position that we could take them to trial.

Senator **Grassley**. Okay. I would very much appreciate that information for the record, but I would like to state that I am not aware of any prosecutions of the 100 largest contractors in 1986. And GAO finds none through July of 1986.

But if there were, I would be pleased to get those for the record.

Attorney General **Meese**. Well, Senator, GAO may or may not be correct. I find frequently there are different premises on which they are operating which do not always produce a factual result. In this case, several major defense contractors, including GTE, General Electric, Litton Industries, Gould Electronics, Hughes Aircraft, have all been involved in investigations and prosecutions. And that is why I think when you get the factual information from us, it will clear up whatever misconceptions you may have from the GAO report.

Senator **Grassley**. Investigations, yes, I will not dispute. Prosecutions, no.

Attorney General **Meese**. Well, if the evidence is not there, we cannot prosecute. That is why I think it is important to get the results of the cases.

Senator **Grassley**. All I can say is that the Department of Justice did verify the data the General Accounting Office reported. I would like to just cite to the GAO study which shows that among 156 cases involving just the top 100 contractors, the main Justice Department prosecuted three and U.S. Attorneys prosecuted six.

Now, I would agree that a total of 9 cases over 4 years is better than nothing. Anything is better than nothing. But after all the rhetoric about getting tough with major defense contractors, I have to ask: Is 9 out of 156 adequate and whether or not there is any evidence that each of those 147 other cases involving top 100 contractors is being given adequate attention.

Attorney General MEESE. Well, Senator, the numbers you have are considerably different from the numbers we have. That is why I think we should provide the information to you with an analysis of every one of those cases.

We have referred a much larger number of cases to U.S. Attorneys; some of them may be in the process of prosecution at the present time. But, again, it is not a question of how many cases are referred. It is how many cases have evidence which are susceptible to successful prosecution.

Senator GRASSLEY. I guess my time is up.

The CHAIRMAN. Thank you. Senator Metzenbaum.

Senator METZENBAUM. Mr. Meese, I want to ask you a few questions about the Nofziger independent counsel investigation. Mr. Nofziger left the White House in January of 1982. The question I have is when did you learn that less than 4 months after he left the White House in May of 1982 that he was lobbying Administration officials to obtain a $30 million contract for Wedtech? When did you learn it?

Attorney General MEESE. Well, I have never learned that, Mr. Metzenbaum. I do not know that he was lobbying Administration officials. I have heard some reference to that. Recently, I saw articles in the newspaper, but I have recused myself from that so I personally do not have any specific knowledge.

Senator METZENBAUM. Did you know and, if you knew, when did you learn that in 1982 Mr. James Jenkins, who was then your deputy counselor when you were the counsel to the President, presided over a May 1982 White House meeting arranged by Nofziger's firm for Wedtech officials?

Attorney General MEESE. I may have known that at the time. I do not recall whether I did or not. I have certainly learned of it since that time. But if the meeting had been conducted by others and Mr. Nofziger, under no circumstances would there have been any improper activity.

Senator METZENBAUM. Let me just go further. When did you learn that Nofziger wrote to Mr. Jenkins shortly after the meeting on behalf of the Wedtech company?

Attorney General MEESE. To the best of my recollection, I saw that in newspaper accounts within the course of the last year.

Senator METZENBAUM. You did not know it before?

Attorney General MEESE. I do not recall knowing it before, no.

Senator METZENBAUM. Several months later, Wedtech did get that contract, and later Mr. Jenkins worked for Wedtech in 1985 and 1986.

Mr. Meese, how do you explain the fact that it was not until the Wedtech matter became a public issue almost 5 years later on January 6, 1987, that you asked for the appointment of an independent counsel to investigate Lyn Nofziger?

Attorney General MEESE. Well, for one thing, it was not until 1985 that I was Attorney General and had that opportunity.

Senator METZENBAUM. But you were chief counsel prior to that?

Attorney General MEESE. No, no.

Senator METZENBAUM. What were you before that?

Attorney General MEESE. I was the counsel to the President and had nothing to do with independent counsel.

Senator **METZENBAUM**. But you did know it at that time?

Attorney General **MEESE**. I had no knowledge that I recall of anything that was being done wrong or done improperly at the time, no.

Senator **METZENBAUM**. Did you know that Mr. Nofziger received over 20,000 shares of stock in 1983 just before Wedtech went public, and that the stock was worth about $720,000 when Wedtech went public?

Attorney General **MEESE**. Not until I saw it in the paper.

Senator **METZENBAUM**. Do you know E. Robert Wallach?

Attorney General **MEESE**. Yes, I know Mr. Wallach.

Senator **METZENBAUM**. Who is he and how do you know him?

Attorney General **MEESE**. Mr. Wallach is a lawyer, probably one of the most prominent personal injury attorneys in California. He also practices in Washington, D.C. He is the chairman of the United States delegation to the Human Rights Commission. He's an ambassador and is also a man that I have known since law school. We went to law school together.

Senator **METZENBAUM**. And have you had a professional relationship with him?

Attorney General **MEESE**. I think when I was in private practice at one time I did refer some cases to him, personal injury cases, almost 30 years ago.

Senator **METZENBAUM**. Is it not a fact that he was one of your three counsels at the time you were up for confirmation?

Attorney General **MEESE**. I thought you meant lawyer to lawyer.

Senator **METZENBAUM**. Pardon?

Attorney General **MEESE**. I thought you meant as lawyers, professional relationship.

In terms of a retainer or representation relationship, yes, he was counsel of mine when I had an inquiry by the independent counsel.

Senator **METZENBAUM**. Did you know he was named general counsel of Wedtech in 1982?

Attorney General **MEESE**. I do not know that he was named general counsel. My understanding was that he was doing some work on contract or retainer for Wedtech in 1982, yes.

Senator **METZENBAUM**. And that he received something in the area of $400,000 in stock?

Attorney General **MEESE**. I have no idea what he received.

Senator **METZENBAUM**. What else do you know about Mr. Wallach's involvement with Wedtech and your involvement with Mr. Wallach?

Attorney General **MEESE**. Well, Mr. Wallach has been a friend of mine, as I say, since law school days. I knew that he had something to do with Wedtech as an attorney in 1981, or I guess it was 1982. It came up in conversation on a few occasions.

Senator **METZENBAUM**. Do you have or at any time have you ever had a direct or indirect financial interest in Wedtech?

Attorney General **MEESE**. No.

Senator **METZENBAUM**. Did you ever through a family member or through Mr. Wallach or through any other persons holding securities in your name have a financial interest in Wedtech?

Attorney General **MEESE**. No.

Senator **Metzenbaum**. When did you recuse yourself from any participation in the Wedtech investigation and prosecution?

Attorney General **Meese**. I recused myself in the Wedtech matter only as it related to Mr. Nofziger. No other prosecution is pending that I would have any involvement in.

Senator **Metzenbaum**. So that you have only recused yourself with reference to that part having to do with Mr. Nofziger?

Attorney General **Meese**. That was on the basis of my long-time friendship with Mr. Nofziger, yes.

Senator **Metzenbaum**. Mr. Meese, some of the information in the Senate Select Committee on Iran report is disturbing. I am disturbed about your views on the power of the President to ignore congressional statutes.

According to the report of the Senate Select Committee on Iran, you told the committee that you advised the White House that they could withhold notification of arms sales from Congress. You gave this advice even though Congress had passed statutes which required that Congress be notified of any arms sales to other countries.

According to the report, you told the committee that you based this advice on your view of the President's constitutional power.

Mr. Meese, is it your view that the President is above the law of the land?

Attorney General **Meese**. No.

Senator **Metzenbaum**. That is what your statement seemed to suggest. How do you reconcile your statement with the conclusion reached by the Senate Intelligence Committee?

Attorney General **Meese**. Mr. Metzenbaum, this is a complex and lengthy legal matter. I'd be happy to give to you or to the Committee an extensive legal brief that we have on this subject, but in the short time available here, let me only say that the Congress itself recognized that the President has certain constitutional authorities in the conduct of foreign policy that cannot be circumscribed either by reporting or other requirements laid on him by the Congress.

This was laid out in the Congressional Record in a colloquy between Senator Huddleston and Senator Javits when the requirements that you talk about were passed as a part of the amendment to the National Security Act in 1980; and they were also included in the signing statement that the President issued when he signed that legislation.

Senator **Metzenbaum**. Mr. Meese, I'll conclude because my time is up, but if you, the chief lawyer in the country, the Attorney General of the United States, can advise the President that he is above the law, I have difficulty in understanding how all the people in this country can think that they have to abide by the law. It seems to me it is pretty difficult for them to understand, and I think you can appreciate that fact.

Attorney General **Meese**. Mr. Metzenbaum, as I said—again, let me repeat, in case you didn't hear—I do not believe the President is above the law, and the advice I gave is clearly within the law, as recognized by the Congress as well as by other legal commentators.

Senator **Metzenbaum**. So the conclusion of the Intelligence Committee is wrong?

Attorney General MEESE. No. I cannot pass judgment on the Intelligence Committee. I can only say that in your interpretation of what they said, if you think that I have said anything about the President being above the law, you are incorrect; and that there is a very firm and complete legal rationale for the advice I gave.

The CHAIRMAN. Thank you. In case anyone is confused as to how I am calling on people, I am going by seniority. The next person in line is the Senator from Wyoming. Unless you have been demoted.

Senator SIMPSON. I appreciate that. I used to make them by the order of their appearance. And I thank you, Mr. Chairman.

The CHAIRMAN. I like your appearance also, so go ahead. [Laughter.]

Senator SIMPSON. That is very good. I cannot lose on a day like this.

How are you doing, Ed?

Attorney General MEESE. So far, so good.

Senator SIMPSON. Welcome to the committee in its reconstituted form. I thank the Chairman.

It is not the first time you've heard the slings and arrows of various members of this panel. When they talk about hostages, you were a hostage for 428 days, weren't you? I think that is true, if I recall.

I'm glad we could get right down into the Justice Department budget here and probe these things. But, indeed, you do have a substantial budget. I am asking my good colleagues in the House—Congressman Mazzoli and others have been interested—about the proper budgeting for the Immigration and Nationalization Service. I know Senator Kennedy will be taking the same interest as he did before in it. It was a pleasure to work with him during those years. He now chairs that Subcommittee on Immigration and Refugee Affairs, and Senator Simon of this panel and myself join him; we have serious oversight responsibility.

We must be sure that the bill works. The educational period during the bill, I think, will assure that it will, as employers will learn what is expected of them. So, I appreciate the significant level of funding that the Administration has requested for this new law. I would just like to clarify for the record, since there has been discussion of discrepancy, why the amounts that Congress authorized in the legislation—the $422 million for fiscal year 1987 and the $419 million for fiscal year 1988—were not equally met in the Administration's request: if you could share that.

Attorney General MEESE. Well, Senator, the requests that we put in were based upon our evaluation of what the adequate and full and complete implementation of the Act would require.

As you know, I believe, already, the requests for fiscal year 1987 are a 56 percent increase over the funds that were originally budgeted for this fiscal year; and we have a 78 percent increase over those funds originally budgeted for fiscal year 1988.

We feel that this will be adequate to fully implement, in the fashion the Congress prescribed, the Immigration Reform and Control Act. If we find that those estimates that we put in our budget are too low, we will certainly be willing to return and ask for supplementals, but we think that it is adequate, based on all the evaluations that we have done.

Senator SIMPSON. Let me ask you another thing of interest. Since the bill was signed in early November, apparently there are 27 percent less apprehensions. Some say that that is because the word went out. Some say it is literally the physical properties of the Rio Grande River, and its level at this time. Do you have any thought on that?

Attorney General MEESE. Senator, I have always been very hesitant to try to predict with exactitude what influences criminal or illegal behavior. I think that there is no question that we have had a decrease in apprehensions, which would indicate a probably even greater decrease in actual number of illegals coming across, because we have considerably increased the resources along the southwest border.

I think it may be a combination of at least two things. It is possible that the law itself has had an impact, particularly the employer sanctions and the other provisions that make it less likely that illegals will receive employment once they get to this country.

I think the second thing maybe the fact of the increased border patrol activity on the border itself may have had an impact. We are continuing to evaluate that, and as we do continue our analysis, we would be happy to share our views with you.

But I think it is certainly a good omen, and does bear out what you and others—you mentioned Congressman Mazzoli and Congressman Lungren and Congressman Rodino have predicted that with the passage of the Act, it would be an important step in getting control of our borders. I hope it lasts.

Senator SIMPSON. I just have a further question. It has to do with the announcement of the new National Drug Policy Board. Could you tell me very swiftly what is the function of that new group? How do you feel it will improve enforcement of this recent, much acclaimed and ballyhooed anti-drug legislation which we passed.

Attorney General MEESE. Senator, basically, the purpose of this board is to bring into one Cabinet-level policy board all aspects of the coordination of anti-drug activities in the executive branch of the Federal Government.

As you know, Congress, in 1985, as a part of the Comprehensive Crime Control Act, created the National Drug Enforcement Policy Board. At that time, the emphasis was on law enforcement. With the activities of President Reagan, in the past 6 months particularly, in expanding the prevention, education, and treatment activities of the Federal Government in regard to drugs, it was desirable to expand the functions of the Board to take on all aspects of drug policy. That is the purpose of the Board.

I think what it will do is create a comprehensive policy development and policy recommendation body that will recommend policies to the President on all aspects of the drug program. It will have, with its two coordinating groups—one for enforcement and one for prevention and health issues—a salutary effect on our ability to provide overview and oversight for this whole program.

Senator SIMPSON. I thank you very much. I thank you, Mr. Chairman, and thank you for your courtesy.

Let me thank you, Ed Meese, for your assistance in a long 6-year period with regard to the Immigration Reform and Control Act. You were superb. You were always ready to assist. Without you and the President, there were many in this Administration that would have just as soon seen it lapse somewhere else. I thank you for that, indeed, and it is good to have you and Commissioner Nelson there to monitor the legislative intent which you know so well—which will not just be ephemeral this time. You know what the legislative intent is.

I thank you, Mr. Chairman, very much.

The CHAIRMAN. Thank you. Senator DeConcini?

Senator DECONCINI. Mr. Chairman. General Meese. I'm concerned about the so-called war on drugs. I might say I think that term is highly over-used. We have yet to really have a war on drugs in my lifetime.

That is not just my own opinion; that is people around the country, including Chief of Police Gates of Los Angeles, whom you know and have worked with. He makes an eloquent argument that if you have a war, you really mobilize your civilian society, all your military assets, and you go after it. But I must say, at least we are on the right road by passing the drug bill.

Mr. Attorney General, the National Drug Enforcement Policy Board is supposed to help coordinate administrative policies on drug enforcement, drug interdiction, and now the demand element of the drug problem.

On August 14th, you announced that the Administration was joining the Congressional effort to launch a major drug interdiction offensive on the southwest border, and I applaud that, and I thank you for the commitment that you have given to that.

In part, this plan was designed to bolster drug surveillance along the border by providing four navy E-2C surveillance aircraft to Customs to patrol the U.S.-Mexico border. Yet only a few weeks later, the Commandant of the Coast Guard, Admiral Yost, launched a full-scale lobbying effort on the Hill, and within the policy board, to take those four E-2C aircraft away from Customs and the southwest border, and put them in the hands of the Coast Guard in the southeast.

Fortunately, Congress passed, and the President signed, the bill that resolved the E-2C matter, as you know, dividing two to the Coast Guard and two to the Customs. Now if the policy board is really coordinating administrative drug policy, how can one overzealous agency head nearly singlehandedly overturn a major plank in the Administration's broad drug initiative?

What specific steps are you taking to make sure that one or two renegade agency chiefs that may have a different agenda stay on board with the Administration, and do not run the policy board in a different direction?

Attorney General MEESE. First, Senator, let me assure you that the Coast Guard is not a renegade agency, and nobody in the Coast Guard is overzealous. If anything, they are zealous, to be sure, in the pursuit of narcotics and narcotics traffickers.

But of all the agencies in the Federal Government outside the Department of Justice, let me say that the Coast Guard has done the best job, in my opinion, of expanding and coordinating their activities with the other agencies.

Senator DECONCINI. That is not an answer to my question, Mr. Attorney General.

Attorney General **Meese**. I will.

Senator **DeConcini**. I know the Coast Guard, and I have talked to the Admiral. I have supported him. I have given him C-130 airplanes with radar, and everything else.

I am saying, why doesn't he follow the Board policy? Why do you, as Attorney General, permit the Coast Guard to run rampant and attempt to reverse the mandate of Congress and the President of the United States?

Attorney General **Meese**. Nobody has reversed either the mandate of the Board or the mandate of Congress.

Senator **DeConcini**. They have really tried hard to do it.

Attorney General **Meese**. The Commandant of the Coast Guard, along with the majority of the Board, including the Department of Defense and most people in the Justice Department, felt that the best way to utilize the E-2C aircraft was to have them operated by the Coast Guard.

Senator **DeConcini**. Notwithstanding what the Congress said.

Attorney General **Meese**. Let me finish. However, because of the congressional decision that the planes should be divided between Customs and the Coast Guard, the Board, under my direction, has issued a specific directive, that this policy should be implemented, and is being implemented at the present time.

Senator **DeConcini**. Yes, it is. I just want you to understand, Mr. Attorney General, that some of us feel that the Coast Guard is an excellent organization, and the present Admiral has one of the most outstanding reputations for commanding the Atlantic fleet. I wish he would get on with business, and stop politicking on the Board. I think only you can see that this happens.

Let me just go into another issue that you and I discussed, and that's the continuing resolution, Law 99-500, that the Customs Service proceed with the development of a P-3 prototype drug surveillance aircraft which would be retrofitted with the APS-138 360-degree radar.

This aircraft would have been used for long-range surveillance by Customs in the high-threat drug area. A total of $19.1 million was made available in the Bill for this project, and the APS-138 radar was authorized, and fully-funded, in the urgent supplemental that passed last year.

Yet despite the approval of Congress, the President, and now you as Attorney General, have approved that, and I thank you for taking that step. We got the information confirmed from your congressional people.

The policy board staff has been studying the P-3 project for nearly 3 months, trying to decide whether or not to go ahead with it. I also understand that despite a statutory mandate to build similar C-130 surveillance aircraft for the Coast Guard, the policy board staff is still trying to decide whether or not to go ahead with these plans.

Why does the policy board, and you as the head of it, allow this type of activity to continue to happen?

Attorney General **Meese**. Senator, the P-3 program is going forward. The only thing that is being done is to assure—because there are many people who feel it is not a feasible program—to be sure that it can go forward within the $19 million, and that the government—neither the Department of Defense nor any other department—will not be charged for any excess if in fact it cannot be done. It is those assurances that are being sought at the present time that are a part of the process of going forward with that project.

As far as the C-130s, on that—this is a matter of serious and sincere questioning by experts as to whether the C-130 program is feasible, and what is the best way to carry it out. It is a matter of not wasting money. We have had other times in the past where Congress has either passed laws or passed items as part of the budget which just were not feasible. When, as a result of expert analysis, we have brought that back to the Congress, the legislation, or the language in the committee reports, has been changed.

There is a serious concern about the C-130 project. The reason that the continued study of the P-3 is taking place is to see whether it is feasible to move from the one P-3 that we are going ahead to the four P-3s that are contemplated in the language of the report.

Senator DECONCINI. Well, Mr. Attorney General, I hope you get my point that I think the policy board is being manipulated, and I asked you as the head of that board to take a firmer position in seeing that once the board's decision is made that it will be carried out by the board.

Let me give you another example. On January 22nd, Congressman Glen English and I planned to hold an all-day meeting with representatives of the various drug enforcement agencies including the Department of Defense to discuss informally and without attribution, without press, the agency plans for the various statutory mandates.

This would have been the third year in a row that we have had such meetings. Yet on January 16, Stephen Trott, Chairman of the Coordinating Group of the Drug Policy, wrote Congressman English to say that you—and I cannot believe that you directed him, but I'll accept whatever you say about that—directed him to decline our invitation to send any executive branch agencies and departments to appear at such a meeting.

Prior to this letter, every agency that we had requested to come always came forward.

Now, frankly, I think it is awfully brazen, and a flagrant example of arrogance on the part of the Administration. It is hard to believe that the policy board staff officials would have the audacity to tell this to the chairman of a major subcommittee, Congressman English who has oversight of this matter, and myself as just one lowly member of this United States Senate, and to deny us an opportunity to have a meeting on what kind of coordinating effort is happening.

Honestly, I think you owe Congressman English an apology. Why did you and Mr. Trott direct Federal drug personnel to not meet with us on January 22 when we wanted to know what you were doing.

Attorney General MEESE. Senator, as you know, I have never failed to meet with you personally.

Senator DECONCINI. I know you have not.

Attorney General **Meese**. Nor declined any invitation nor have we failed to appear at any hearing that was held by any of the committees. This was a rather irregular and exceptional nonhearing type of meeting. There was a great deal of uncertainty among all the agencies as they expressed concern as to whether information would be leaked to the press or whether the press even might be present. This was the reason for the common understanding among all the agencies that they would prefer to do this in a more regular manner.

Senator **DeConcini**. Well, they are going to get the chance.

Attorney General **Meese**. If there was a misunderstanding about what the intention of you and Mr. English was, I am sure we would be glad to reconsider it and, again, this is a matter that I will always be glad to talk with you about.

Senator **DeConcini**. I know you have been, Mr. Attorney General, and I thank you for that. I know my time is up. But let me tell you that Congressman English is planning to have such a meeting.

Now, it is going to be in the open on April 1st, I understand, which will be a more appropriate day perhaps. All these agencies will be called before his subcommittee and whatever problems occur there might have been solved or at least talked out without having to put all the dirty laundry out, if there is any.

Hopefully there will not be any by April 1st, but to me, some bad judgment is made when you have some people up here who want to work and who have taken some leadership roles, particularly Congressman English, and to not let them come and talk.

Attorney General **Meese**. I think, Senator, if there is assurances that the meeting will be in some sort of regular forum, if there are assurances as to the ground rules which can be worked out, I am sure we would always comply, and if there was a misunderstanding, I am sure it will be corrected in the future.

I think that, as you suggest, there will be no dirty linen, and I think perhaps it will be good for the public to see the high level of coordination that has taken place and the progress that has been made by all of these agencies.

The **Chairman**. Speaking of ground rules, let me ask General, what is the latest you can stay?

Attorney General **Meese**. 12:00.

The **Chairman**. We had agreed ahead of time that we would let you meet that obligation. There is a vote on and there are 5 bells, which means we have about 5 to 7 minutes left. Will you be willing to come back at a date that we can mutually arrange, because obviously you can see the interest, and all of my colleagues on both sides of the aisle have not had an opportunity, to answer questions.

Would you be willing to come back at a date that we could arrange?

Attorney General **Meese**. Senator, I would be happy to come back if that were necessary. It may be that we can accommodate this by some written questions.

The **Chairman**. Well, I can assure you that the members feel it is necessary, and in addition to that, we will submit to you between now and then written questions.

But will you be willing to come back to complete this first round at an appropriate time?

Attorney General MEESE. We will see if we can work out a convenient time.

The CHAIRMAN. What does that mean? I am not sure.

Attorney General MEESE. That means, yes, I will be willing to come back when we can work out a convenient time.

The CHAIRMAN. We will work out a time.

Now, I say to my colleague from Pennsylvania, he is welcome to move forward for the next few minutes and, in fact, if anyone can get back here by 12:00 to continue questioning they may do so.

Senator SPECTER. Mr. Chairman, if it is my turn, I will be back within 6 or 7 minutes to take my turn then.

The CHAIRMAN. All right. We will recess for 6 or 7 minutes to reconvene for another 6 or 7 minutes.

Attorney General MEESE. But I will leave at 12:00?

The CHAIRMAN. I guarantee that.

Senator LEAHY. I will be submitting some questions with the Chairman's permission.

The CHAIRMAN. We will recess for as long as it takes Senator Specter to get back and/or until 12:00, at which time we will adjourn.

[Recess.]

Senator SIMON [presiding]. The Chairman has asked me to go ahead and reconvene the meeting, and I understand you have to leave at noon, General.

Attorney General MEESE. Yes, Senator.

Senator SIMON. Since this is the first meeting at which my friend Joe Biden is the chair, let me also acknowledge, even though he is not here, that Senator Thurmond was very good to this freshman member of this committee and I am very grateful to him for that.

If I may follow through on the question of Senator Biden on the judgeships, let me read a paragraph from the New York Times from April 18th of last year. It says, "Andrew L. Frye, Deputy Solicitor General in the Justice Department, was nominated last July for the Court of Appeals for the District of Columbia. However, he had made small contributions to Planned Parenthood and to the National Coalition to Ban Handguns. Thirteen Republican Senators demanded that his name be withdrawn because of these contributions and in an unusual action, the President complied."

First of all, is that story accurate and how does that mesh with what you had responded before?

Attorney General MEESE. What was the date of the article?

Senator SIMON. April 18, 1986.

Attorney General MEESE. I remember the case generally. I don't recall all the details, but I think that is essentially accurate or at least I think all of those components were involved in the situation.

Senator SIMON. What does that say about the process if we get 13 members of the Senate suggesting somebody be withdrawn?

Attorney General MEESE. Well, I think what it suggests is that a President would be naturally reluctant to put up for a nomination someone where his own party or the majority or a substantial portion of his own party does not want him put up.

Senator SIMON. So if we get 13 Senators to ask that a name be withdrawn that that could happen again?

Attorney General **Meese**. I think it would depend on the circumstances.

Senator **Simon**. In connection with the Court of Appeals, if I understood you correctly, and I may not have written this down correctly, you said nominations for the Court of Appeals come from the District Courts.

Attorney General **Meese**. I say many of them come from the District Courts. Wherever possible, we try to nominate people or at least many of the people from either District Courts or people who have had experience on State courts where we can review their background as judges. The exceptions have been unusually qualified people in the private practice or law professors.

Senator **Simon**. I misunderstood your earlier statement. The District Court judges are not involved in the process of selecting who might be chosen?

Attorney General **Meese**. Not at all, but we pick from that pool probably more than any other single group.

Senator **Simon**. Let me add one other concern that I share. Senator Kennedy talked about it. If I could add, I think some maybe occasional informal meetings between you and the members of this committee might result in less confrontational meetings when we, on these rare occasions, get together like this.

Last night I read your statement and it was quite late when I read the statement. Maybe I missed something that was there. But I did miss that the chief law enforcement officer of this Nation, I missed a sense of championing civil liberties and civil rights. I think that clearly is a major function of your office.

Then when I combine that with what has been reported to be your views on the *Miranda* decision—and again maybe those views have not been correctly related to us—and a lack of movement forward in the affirmative action area in general, I get to feel uneasy.

Do you care to comment on this whole matter?

Attorney General **Meese**. I think I can relieve your unease then, Senator, because, first of all, what I had before this committee was essentially a budget statement, and we are continuing the high level of priority to civil rights which has been afforded. So there is no major change in the budget per se. We will continue to have adequate resources devoted to that.

If you are interested in a statement of our Department priorities, I would be very happy to send you that which is a separate document which perhaps will show you where our priorities are, and I think they might be very interesting.

But that is the distinction between that and the budget document you were reading or essentially an analysis of the budget.

Senator **Simon**. I understand it is a budget document in a sense, but other than the one statement, "We all agree on the fact that the Department of Justice performs core functions of government," and maybe that could be a reference to civil rights and civil liberties.

Attorney General **Meese**. Well, there were a lot of things that were not included in there. A lot of our litigation activities. There were a lot of our activities in the community relations service that are extremely important.

There were a lot of things that did not have major budget changes that were not put in the statement. That is why I say I will be happy to send you a statement of our Departmental priorities which I think would give you a better fix on what we think is important.

Senator SIMON. I understand that. But I just want to underscore that there ought to be something you look at every morning when you walk into your office, a reminder that you are the chief defender of civil liberties and freedom for this country, and that just has to be basic.

Attorney General MEESE. Well, this is the way I feel, and what I have said in numerous public statements including the first statement I made as Attorney General the day I was sworn in.

Would you like me to continue on the other comments?

Senator SIMON. Yes.

Attorney General MEESE. As to *Miranda,* I think the important thing to recognize there is that this is a matter of balancing. *Miranda* is a relatively new decision in the constitutional history of the United States.

It said things that were specifically repudiated for nearly 175 years of our constitutional history, and at the time, *Miranda* was a very controversial decision, the leading members of the Supreme Court, such as Justice White, Justice Harlan and others, dissented. It has been severely criticized by a number of legal scholars and almost universally by law enforcement officers.

So what we have here is recently there was a study, a very scholarly study done of the *Miranda* decision by the Department, and it suggested that the objectives of *Miranda* could perhaps be achieved by better ways, using modern technology and also that things could be done in a way that would provide a better balance between the rights of individual criminal defendants or suspects on the one hand, and the responsibility of the criminal justice process as a search for truth on the other.

So that is what this is all about. At no time is there any desire on my part or on the part, so far as I know, of anyone in the Department to interfere with the protection of individual rights, certainly I consider myself one of the foremost defenders of individual rights in the United States.

Senator SIMON. Well, the *Miranda* decision basically says that when someone is arrested, that person should be told of his or her rights. Do you feel uncomfortable with that?

Attorney General MEESE. No, not at all.

Senator SIMON. Well, the impression certainly is to the contrary, and it is an area that I guess maybe in one of these meetings we ought to be exploring.

Since my colleagues are not here yet, I am going to take more than my 10 minutes right now. Let me read another statement. This from the Washington Post, November 26, 1986:

"Attorney General Ed Meese III, who has argued for voluntary recruitment of minorities instead of traditional affirmative action has not brought in any women or Blacks for senior policymaking jobs at the Department of Justice since taking office 21 months ago."

Is that an accurate statement?

Attorney General **Meese**. No. Simply untrue.

Senator **Simon**. Can you mention a prominent position in the Department that a woman or a minority holds?

Attorney General **Meese**. Yes. I appointed a black as Assistant Attorney General for Administration. This was the first time in the history of the Department that a black was appointed as the Assistant Attorney General in charge of Administration. That person happens to have left now but that was an appointment I made in the first months of my taking office.

I have made appointments on an acting basis of a minority in charge of the Community Relations Service. I have nominated, and I cannot reveal the name of the person, but I have nominated a minority for the permanent position.

So we have had women when I took over at top policymaking levels, and I have been instrumental in putting women into other policymaking levels within the Department at the executive level, yes.

Senator **Simon**. One final question then I yield to my colleague from Pennsylvania.

The problem of the Cubans, the Mariel Cubans, who have been sentenced and served their time and still now are being held. I frankly do not know how we deal with it, but obviously, you have had to reflect on this. What do we do here?

Attorney General **Meese**. Well, the main solution for the Mariel Cubans is returning them to Cuba. Unfortunately the administration in office at the time allowed them to come into this country and it has been a problem ever since.

We had negotiations going with Cuba and did, in fact, return some of them and then unilaterally the Cuban government broke off that arrangement. I would hope that we would and we are seeking to continue to regularize that process and have as many as possible return to Cuba at some future time. We are continuing those efforts.

In the meantime, we have had a combination of efforts. Some are incarcerated by the Bureau of Prisons. Some are incarcerated by the Immigration and Naturalization Service. Some are incarcerated in primarily State, but I think in some cases local institutions, as well.

I apologize that the time has now come where I will have to leave, and as I indicated to the Chairman, I will be able to return at some time which we will arrange in the very near future.

Senator **Specter**. Could I ask you one question about Hamadi, Mr. Attorney General? There are a number of matters that I will take up next time. But the extradition of Hamadi is especially timely, and I commend the Department of Justice on what you have done there, and there are some other subjects that I want to get into with you and relate with you on a related line.

But could you give us an update as to what is happening as to the extradition of Hamadi and what the prospects are for bringing him back for trial for the hijacking of the TWA plane and the murder of Stedum?

Attorney General **Meese**. We have completed our responsibility for getting the extradition documents before the German criminal justice process. It is now under review by them. I understand that these proceedings in that country normally take a period of several weeks and in some cases several months as a normal matter.

We are continuing all of our efforts to have Mr. Hamadi extradited and we are certainly hopefully that this will be done. We have no reason to believe otherwise.

Senator **Specter**. You think it will be accomplished?

Attorney General **Meese**. I certainly hope so.

Senator **Specter**. Thank you very much.

Senator **Simon**. Thank you.

For the record, Senator Humphrey has a statement he wishes to enter in the record.

[Statement follows:]

STATEMENT OF SENATOR GORDON J. HUMPHREY
SENATE JUDICIARY COMMITTEE

AUTHORIZATION/OVERSIGHT HEARINGS
U.S. DEPARTMENT OF JUSTICE
FEBRUARY 4, 1987

MR. ATTORNEY GENERAL, I JOIN IN WELCOMING YOUR APPEARANCE BEFORE THIS COMMITTEE.

INITIALLY, I WOULD LIKE TO COMMEND THE DEPARTMENT ON THE EXCELLENT OVERALL ACCOMPLISHMENTS ACHIEVED DURING YOUR TENURE. NOT ONLY HAVE YOU ESTABLISHED A SOLID RECORD IN THE OPERATIONAL ASPECTS OF THE DEPARTMENT'S MISSION, BUT I BELIEVE YOU HAVE ALSO SET THE PROPER TONE AND PRIORITIES FOR THE FEDERAL GOVERNMENT'S GENERAL LEGAL POLICY.

I ALSO COMMEND THE PRESIDENT AND YOU FOR THE GENERAL EXCELLENCE OF THE JUDICIAL NOMINATIONS YOU HAVE PRESENTED FOR CONFIRMATION. I AM CONFIDENT THAT FORTHCOMING NOMINEES WILL CONTINUE TO REFLECT THESE HIGH STANDARDS.

I ENCOURAGE YOU TO PRESS FOR RESTORATION OF A HEALTHIER BALANCE BETWEEN THE NECESSITIES OF CRIMINAL LAW ENFORCEMENT AND THE PROCEDURAL RIGHTS EXTENDED TO CRIMINAL VIOLATORS BY JUDICIAL INTERPRETATION. I HOPE THIS CONGRESS WILL PASS LEGISLATION WHICH SUPPORTS THAT IMPORTANT OBJECTIVE.

I ALSO HOPE YOU WILL BE ALERT TO PROTECT AND CHAMPION THE MOST FUNDAMENTAL CONSTITUTIONAL GUARANTEE OF ALL: THE RIGHT TO LIFE WHICH EXTENDS TO ALL HUMAN BEINGS.

THERE HAVE BEEN SOME ASPECTS OF YOUR TENURE WHICH HAVE BEEN HARSHLY CRITICIZED BY OPPONENTS OF THE ADMINISTRATION. THAT IS TO BE EXPECTED IN A DEMOCRATIC SOCIETY.

BUT I MUST TAKE ISSUE WITH THE SUBSTANCE AND TONE OF SOME OF THIS CRITICISM.

I DIFFER, FOR EXAMPLE, WITH THOSE WHO HAVE ATTACKED THE INTEGRITY OF THE DEPARTMENT'S APPROACH IN THE FIELD OF CIVIL RIGHTS. IN THE VIEW OF MANY, THE DEPARTMENT'S EFFORTS TO RESTORE THE ORIGINAL PRINCIPLES OF CIVIL RIGHTS LAW -- EQUAL OPPORTUNITY FOR ALL AND PREFERENTIAL TREATMENT FOR NONE -- WERE LONG OVERDUE.

AT THE SAME TIME, THE DEPARTMENT HAS FORCEFULLY AND EFFECTIVELY ATTACKED THE MOST REPREHENSIBLE AND DAMAGING FORMS OF DISCRIMINATION. FOR EXAMPLE, I COMMEND THE DEPARTMENT'S EFFORTS IN MORE THAN DOUBLING THE NUMBER OF CRIMINAL PROSECUTIONS FOR ACTS OF RACIAL VIOLENCE IN COMPARISON TO THE EFFORTS OF THE PREVIOUS ADMINISTRATION.

THERE ARE SEVERAL OTHER AREAS WHERE THE DEPARTMENT'S POLICIES HAVE BEEN SHARPLY CRITICIZED, BUT I WILL WITHHOLD MY OBSERVATIONS ON THEM UNTIL THE MORE SPECIALIZED HEARINGS SCHEDULED TO DEAL WITH THEM. I WOULD SIMPLY EXPRESS MY HOPE THAT THIS CONGRESS DOES NOT ATTEMPT TO IMPEDE THE CRITICAL LAW ENFORCEMENT RESPONSIBILITIES OF YOUR DEPARTMENT WITH OVERZEALOUS LEGISLATIVE INTERFERENCE.

SINCE THE MAIN PURPOSE OF THIS HEARING IS TO EXAMINE THE DEPARTMENT'S PROPOSED BUDGET REQUESTS, THERE IS ONE LARGE BUDGETARY ISSUE I WOULD LIKE TO RAISE AT THE OUTSET.

ALTHOUGH I VOTED AGAINST LAST YEAR'S LEGISLATION TO AUTHORIZE BLANKET LEGALIZATION OF MILLIONS OF ILLEGAL ALIENS, I RECOGNIZE THAT THE DEPARTMENT HAS A HEAVY RESPONSIBILITY TO DISCHARGE UNDER THAT LAW, AND THAT IT WILL BE COSTLY. BUT I AM TROUBLED TO SEE THE NEAR DOUBLING (78% INCREASE) OF THE IMMIGRATION SERVICE'S BUDGET IN ONLY ONE YEAR, AS NOW PROJECTED.

MUCH OF THIS INCREASE MAY BE UNAVOIDABLE. BUT I HOPE AND EXPECT THAT MOST OF THIS BILLION-DOLLAR BUDGET WILL BE USED

TO CONTROL THE ILLEGAL IMMIGRATION PROBLEM RATHER THAN TO MERELY ACCOMMODATE IT.

I AM ESPECIALLY CONCERNED THAT THE ACT'S "LEGALIZATION" PROGRAM BE MAINTAINED ON A STRICTLY SELF-FUNDED BASIS, AS INTENDED BY CONGRESS. ALTHOUGH I UNDERSTAND THE DEPARTMENT SHARES THIS VIEW, IT IS IMPORTANT THAT ACTUAL IMPLEMENTATION OF THE PROGRAM BE FAITHFUL TO THIS MANDATE.

FINALLY, I HAVE JUST SUBMITTED A BILL WHICH WOULD PROHIBIT THE BUREAU OF PRISONS FROM SPENDING ANY APPROPRIATED FUNDS TO SUPPORT ABORTIONS, IN KEEPING WITH THE FEDERAL POLICY EXPRESSED IN THE HYDE AMENDMENT. I HOPE THE DEPARTMENT WILL ADHERE TO THE PRINCIPLES OF THE HYDE AMENDMENT IN THAT AREA AND IN ALL OTHER ASPECTS OF ITS PROGRAMS AND POLICIES.

Senator SIMON. The committee stands adjourned.

[Whereupon, at 12:02 p.m., the committee adjourned at the call of the Chair.]

AUTHORIZATION LEGISLATION AND OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

WEDNESDAY, MARCH 4, 1987

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, at 10:03 a.m., pursuant to notice, in room SD-226, Dirksen Senate Office Building, the Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, Leahy, Heflin, Simon, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

OPENING STATEMENT OF CHAIRMAN JOSEPH R. BIDEN, JR.

The Chairman. The committee will come to order. Welcome back, General. I would like to make a brief opening statement. I have a few very brief questions and then, with the permission of my colleagues, I will yield to those who did not ask questions the first time around.

General, we will try very hard to accommodate your schedule. I understand that you have a meeting with Scotland Yard at noon or thereabouts, 12:30, and we will try to move this along very rapidly.

I would like to insert, in the interest of time, an opening statement which, quite frankly, deals exclusively with the question of the independent counsel and what the Justice Department is going to do in terms of (a) interceding on behalf of the statute, and (b) if it is declared unconstitutional, what course of action you will take.

[The statement follows:]

Opening Statement of Senator Joseph R. Biden, Jr.

Mr. Attorney General, once again let me welcome you and thank you for making your time available this morning.

We hope to finish your testimony at our general oversight and budget hearings on the Department of Justice today. I have been assured by your staff that you will be able to remain with us this morning until every Senator has had an opportunity to complete his questioning.

First I'd like to make a comment on the most recent developments of yesterday. I would like to congratulate the President on his decision to select Judge Webster as Director of Central Intelligence. This is certainly a loss for the FBI and for this committee, but again for the Nation. Judge Webster is a man of highest integrity and candor—a thorough professional with whom this committee has an excellent working relationship.

As you know, yesterday Judge Webster and I discussed in the hearings the criteria and the process that should be used in selecting his successor. It is this committees hope that the administration will follow the advice that was given here yesterday—that the Director should be a person out of the Webster mold; a person of the highest integrity who will command instant respect, within the bureau and this committee. It was our clear consensus that it is essential that the individual be non-ideological and non-partisan.

Before we begin, I also feel it is imperative to discuss with you, General Meese, a matter of the gravest concern to the American people—the future of the Independent Counsel investigations that are now endangered by lawsuits brought by Michael Deaver and Lt. Colonel North.

To ensure the independence of those called on to investigate possible wrongdoing by the highest officials in Government or the President's closest associates, Congress devised a carefully crafted procedure under the Ethics in Government Act that, I predict, will withstand constitutional challenge.

At the time the statute was written nearly 10 years ago, and later in 1982 when certain procedures were revised, we heard opinions from some of the Nation's foremost constitutional scholars that the scheme of selecting and removing Independent Counsels did not violate the separation of powers doctrine.

But it is well known that the Justice Department, at least during the Reagan Administration, has not been fond of the Independent Counsel statute. In 1981, Rudolph Guiliani, then Associate Attorney General, told the Senate Government Affairs Committee of his reservations about the constitutionality of the Special Prosecutor provisions restricting the President's removal power.

Most recently, Charles Cooper, Head of the Office of Legal Counsel, indicated to the newspaper, *Legal Times*, that the Justice Department would join in an "appropriate" lawsuit to overturn the law. Now the Justice Department has been joined as a defendant in the suit brought by Oliver North and an answer is going to be required.

Frankly, I'm struck, General Meese, by a possible inconsistency in the Justice Department's position. I'm certain I do not need to remind you that you called for the appointment of an Independent Counsel to dispose of a variety of allegations about yourself that arose at the time of your confirmation. You have invoked the procedures of the Ethics in Government Act, seeking the appointment of an Independent Counsel in at least five cases since you became Attorney General.

If you decide not to defend the statute from constitutional attack, this will seriously undermine the credibility of the Department and the Independent Counsels.

On March 11, the district court may well rule that the procedures to appoint an Independent Counsel violate the separation of powers doctrine and are therefore unconstitutional. If that happens, all pending Independent Counsel investigations will be put on hold. It could be a year or more before these cases make their way through the judicial process to the Supreme Court.

What are we going to do in the meantime? Will the investigations continue? Will you appoint the individuals serving as Independent Counsels, such as Mr. Seymour and Mr. Walsh, as officers of the Justice Department so that their work may go forward? If you do that, what constraints, if any, will be placed on their activities? What would be the grounds for their removal?

I am going to ask these questions, Mr. Attorney General, because President Reagan has moved in the right direction to resolve the Iran/Contra affair and I applaud the work of the Tower Commission. But we must work together to ensure that we develop a joint set of standards for the Independent Counsel just as the committee did in 1973 with Attorney General Richardson.

But the work of the Independent Counsel is absolutely critical if we are to know who, if anyone, broke the law. There should be no appearance, or even hint of an appearance, that the work of the Independent Counsel will be compromised—in the Iran/Contra case or in any other pending investigation.

I want to make a sincere offer to work together to ensure that the integrity of the investigative process is maintained, no matter what the technical ruling on the constitutional issues turns out to be. This committee has oversight responsibilities that extend beyond the specific mandate of the Ethics in Government Act and I intend to see that those responsibilities are met. I hope you can give us some answers here today and I expect to continue these discussions in the future.

The CHAIRMAN. In the interest of time and to accommodate my colleagues, I would like to move immediately to several relatively short questions I have and then yield to my colleagues.

I would like to discuss with you, General, a question I raised yesterday with Director Webster who will now I think, to the extent that you are part of the choice or whomever made the choice, I think it was a brilliant choice, to ask Judge Webster to move over to the CIA.

I am no longer on that committee, although I was on it for almost nine and a half years, and I think, based on my knowledge of the agency and the importance of it and his reputation for integrity and candor, and, in addition to that, his expertise over the years acquired from his role with the FBI, will be invaluable, an invaluable addition to this country's security.

But I would like to talk to you about his successor and not who but how, if I may. As you know, Judge Webster is very highly regarded by all of us on both sides of the aisle and now that he is leaving to be the head of the CIA, and many of my colleagues hope whomever is named to replace him will be capable of doing an excellent job, as he did.

Can you tell us, General, how close you are to selecting the nominee and what role, if any, Judge Webster will play in that selection process?

STATEMENT OF HON. EDWIN MEESE III, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Attorney General **Meese**. Mr. Chairman, let me assure you that the selection of Judge Webster as the Director of the CIA, Director of Central Intelligence, was made by the President.

As far as his successor, it is a decision that will also be made by the President upon my recommendation. Last night I started thinking about this. I talked with Judge Webster about it this morning. He will be one with whom I will consult and anticipate his active participation with me in what I think will be a nationwide search for the best possible person to replace him.

If we could clone Bill Webster, we would be able to have the person who is the best. That not being possible, we will try to find someone with the same excellent capabilities, unquestioned integrity; someone who will continue the fine work that Bill Webster has done.

I cannot tell you precisely how close we are, because we have just begun. I will be meeting, of course, today depending again on how long these proceedings take, to get involved in that subject directly.

The **Chairman**. In light of the fact that you are meeting with Senator Thurmond, I was worried that you were about to offer it to him. We cannot afford to lose him. I do not want him to go.

Senator **Thurmond**. I am not interested, thank you very much. I appreciate the honor. [Laughter.]

The **Chairman**. Let me follow up: Yesterday, Judge Webster, when I asked him what he thought were the most important qualifications and potential disqualifications, Judge Webster stated that he thought it would be a serious impediment—these were his words—a serious impediment to the effectiveness of the FBI if the President selected a long-standing political ally or friend to be the Director of the FBI. Do you agree with that?

Attorney General **Meese**. Yes, basically, yes, I think that is correct. I think that if the person is selected on the basis of past political involvement and so on, that is definitely not the way the FBI Director should be selected.

The CHAIRMAN. Judge Webster also went on to suggest that the nominee should be a person who is disengaged from the political process. Do you agree with that assessment?

Attorney General MEESE. I would basically agree, yes.

The CHAIRMAN. How important is it that the next FBI Director be someone about whom there is a consensus as to their competence, integrity and sort of apolitical bearing?

Attorney General MEESE. I think this will be a very important part of the qualifications, for two reasons: First of all, so that there would be widespread public confidence and confidence among knowledgeable people in law enforcement as to the qualifications of the individual; and, second, I think whoever is nominated by the President should be capable of being confirmed rather quickly.

The CHAIRMAN. Let me shift gears very briefly, and I will end this in two minutes, my questioning. Do you—I would like to speak about the independent counsel for a minute. Has the Justice Department made a judgment about what role you will take in defending or not defending the statute from the constitutional attack that is now being made, the attack as to its constitutionality in the courts?

Attorney General MEESE. First of all, Mr. Chairman, let me say that I am absolutely committed to take the necessary steps of developing legal positions and actions that will enable all of the Independent Counsel in the pending investigations to continue their efforts.

We are working on a variety of strategies. As far as the specific point on constitutionality of the statute, I do know there are differing views on this subject among legal scholars and there have been issues raised concerning the constitutionality of the Act.

It is my hope and my desire that we will be in a position that is consistent with our responsibility to defend the statute and at the same time to be true to the Constitution. We are working on that problem now. I have been meeting with the Independent Counsel in the *North, et al.* case, as it is known today, and we hope to have some further progress on that. I can assure you that it will be the desire of the department and we will be capable, I am sure, of resolving the issue in a manner so that the Independent Counsel can continue their efforts.

The CHAIRMAN. Well, I will come back to this line of questioning, but it seems you have answered it, Mr. Seymour and Mr. Walsh are going to find a way that they stay on the job, but not whether or not you will defend the statute in court.

Attorney General MEESE. This is still under consideration. We are trying to find ways to do this.

The CHAIRMAN. I do not want to take any more of my colleagues' time. Let me ask my friend if we are willing to yield to those who have not, unless you have a——

Senator THURMOND. Mr. Chairman, I agree with you. I have propounded my questions heretofore and I think we ought to yield to the others who have not had the opportunity of asking questions.

The CHAIRMAN. Because of the graciousness of Senator Specter, who was in the process of questioning the last time but yielding to the Chairman of the Agriculture Committee, having nothing to do with agricultural policy in Pennsylvania, but we will yield to the Senator because he has a markup session that will begin, and then we will go to Senator Specter, and I appreciate his courtesy.

Senator Leahy. I appreciate that, Mr. Chairman.

Attorney General Meese, I want to also say how delighted I am to see the selection of Judge Webster as the new head of the CIA. As one who has dealt with Judge Webster both in connection with the Judiciary Committee's dealings with the FBI and formerly in connection with the Intelligence Committee's dealings with the CIA, I think he is an excellent choice. The President should be commended for that and I think, even more importantly, Judge Webster should be commended for his willingness to accept the position.

Unlike many who might take on that job, I think he goes there with no illusions. He knows how difficult it is going to be. He knows what is on the surface and what lies below the surface, and I think that we are all fortunate, all Americans, it makes no difference of party, to have him in such a position.

I do not envy you and the President now of deciding who will replace him. In the Constitution it says the Senate has to consent to a nomination before a Federal judge can be appointed, the advice and consent clause. The Constitution, perhaps wisely, doesn't tell the Senate how they should go about exercising that responsibility. There has been a lot of discussion of how we are going to do it this year and some of that discussion has involved my own role in heading up a task force on that.

So let me get your thoughts on a number of lines of inquire that the Judiciary Committee would like to pursue in order to be able to make an informed decision on whether or not a particular nominee ought to be confirmed, to just lay the groundwork. These are basically, I would suspect, yes or no questions, but would you agree, for example, that the Senate must determine whether or not a nominee has the intellectual capacity to be a good Federal judge?

Attorney General Meese. Yes.

Senator Leahy. Would you agree that the Senate must inquire into the nominee's legal training and experience at the bar?

Attorney General Meese. I think that would be wise.

Senator Leahy. Would you agree that the Senate must be satisfied that the nominee can manage a caseload and the increasing administrative responsibilities of a modern courtroom?

Attorney General Meese. Yes.

Senator Leahy. Would you agree that the Senate must determine their nominee's integrity as above reproach?

Attorney General Meese. Absolutely.

Senator Leahy. And would you agree that the Senate must inquire into whether a nominee is qualified for the bench by reason of judicial temperament?

Attorney General Meese. Yes.

Senator Leahy. And would you agree that the Senate must determine the depth and consistency of the nominee's commitment to the rule of law, to equal justice and to fairness for all who may come before the court?

Attorney General Meese. Yes.

Senator **Leahy**. And would you agree that the Senate must be satisfied that the nominee would decide cases in accordance with precedents established by courts superior to the one to which he has been nominated?

Attorney General **Meese**. Yes, I think that is an appropriate line of questioning. As a matter of fact, these are practically the same criteria that we use in the Department of Justice.

Senator **Leahy**. I understand. That is why I am asking. I want to make sure we have it on the record so we all understand and those who are concerned about how we are doing this understand. Incidentally, my answer would have been the same as yours on that, so if this is giving you any trepidation, that we are in this much agreement—you will get a copy of the transcript before it becomes official.

Would you agree that if a nominee has expressed strongly held personal views on a controversial issue, the Senate has to ascertain whether he can set those views aside and apply the law impartially?

Attorney General **Meese**. Yes.

Senator **Leahy**. And would you agree that the Senate should establish the particular strengths and potentials the nominee would bring to the specific court to which he has been nominated?

Attorney General **Meese**. Yes. I am not sure exactly what you mean by that, but—do you mean if it is a specialized court—I think the answer would be yes.

Senator **Leahy**. If you have got somebody going to Tax Court, for example.

Attorney General **Meese**. Right.

Senator **Leahy**. And what about the Senate inquiring into the nominee's view of the role of Federal courts in our society?

Attorney General **Meese**. Yes, I think that is appropriate.

Senator **Leahy**. What about the Senate inquiring into how the nominee, if confirmed, would go about interpreting how the commands of the Constitution and the laws apply to the cases that may come before he or she?

Attorney General **Meese**. I think as a general proposition that is appropriate, so long as members of the committee do not try to press the prospective judge into taking a particular position on a particular issue that may come before him or her.

Senator **Leahy**. I understand. I think most of us would agree that that would be inappropriate. Of course, the rub will come as we apply these general principles to particular nominees. Your answers are, to me anyway, an indication that we are in agreement on the general principles and I suspect that there are areas that each member of this committee, Republican or Democrat, would agree to. It is nice to start off on those general principles. As I said, the application may raise questions.

We come into the Judiciary Committee and we get this list of judges and that is one of 500 other things that we have facing us that day, just as you have dozens of things or hundreds of things that face you every day. But one of the things we rely on is what sort of recommendations come from the Senators of the particular State, and one way the Senators of a particular State can inform themselves about the most promising judicial candidate is to establish impartial screening panels, get applications from the candidates, interview and evaluate the candidates, make recommendations to the Senators. Do you think the merit screening panels are a useful tool for identifying strong candidates for the bench?

Attorney General **MEESE**. I think in some cases they have been useful, in other cases they have been somewhat less than useful. I think it depends really upon a Senator's knowledge of the people that might be available to him in a State. If a Senator has been an active member of the bar, that gives him one vantage point that might not be shared by someone who does not have that background.

I think it is important also who is put on these selection panels. Calling them a merit panel does not automatically make them a merit panel, and sometimes——

Senator **LEAHY**. It could be a political patronage panel.

Attorney General **MEESE**. It can be and in some cases they have had it in past history. Also, you can sometimes substitute bar politics, internal bar politics for other kinds of politics. I think it is a matter really of what seems to suit a particular Senator's needs the best, the size of the State, his own relationship to the bar, all of these things would be factors as to whether they are useful or not.

Senator **LEAHY**. No matter what a particular Senator may recommend for a judge, you are the one who makes the final signoff before it goes to the President for nomination.

Attorney General **MEESE**. Right.

Senator **LEAHY**. Do you encourage Senators to use a merit screening panel, one that goes beyond the question of bar politics or a patronage type thing, but have you encouraged Senators in these States to set up a merit screening panel?

Attorney General **MEESE**. We have not either encouraged or discouraged them from doing it. We have left it entirely up to the Senators, because they know their own situation best.

Senator **LEAHY**. So you do not have any particular guidelines that you might use for somebody who would want to set up a merit screening panel?

Attorney General **MEESE**. We would be happy to cooperate with such a Senator and obviously suggest things to be avoided and things that might be helpful. But as far as whether they should or not, that is really the individual Senator's decision.

Senator **LEAHY**. I would be interested in any suggestions the Department of Justice might have in what could go into a merit screening panel, because we may well end up at some point in this committee making a suggestion, at least some broad guidelines. I realize that every State and every Senator is going to make up their own mind whether to do it or not, but if you have ideas I would be glad to hear them.

Last month, as I read the record, I was not here but when you testified before the committee there was extensive discussion of the administration's record in nominating women and members of minority groups to the Federal bench. What I would like to do, instead of going back to that discussion, I want to go back to when you were being nominated, your nomination hearing.

On January 29, 1985, you testified, in response to a question from Senator Kennedy, and you said, "Certainly if I am confirmed by the Senate as Attorney General, I will make the greatest search to try to find as many qualified people from all minority groups for presentation to the President for judgeship." Now, that was 2 years ago. What steps have you taken to make the greatest search for qualified minority candidates direction the Federal bench?

Attorney General **Meese**. We have given that direction to our Office of Legal Policy, which goes out and looks for candidates, particularly for the circuit courts. As you know, the tradition has been in the Senate, that in the case of district courts, the recommendations come normally from the Senator in a particular State of the President's party. We have also worked with those Senators to try to identify qualified minority members and qualified women.

Senator **Leahy**. What specifically did you do with the Republican Senators, who would be the members of the President's party, what specifically did you do to seek out minorities?

Attorney General **Meese**. In our conversations with them, we have encouraged them to find those people and to look toward qualified minority and women candidates in the course of their searches in their own States. This has been a matter of considerable interest to us as we review the candidates they submitted to us.

Senator **Leahy**. Suppose they just ignore that, suppose they ignore any questions of seeking minorities or women, do you then go and search out yourself?

Attorney General **Meese**. Well, the tradition has been—and I think on both sides of the aisle—the tradition has always been that the Senators are the ones who propose the nominees. However, we have in many cases, we have suggested people on occasion to them. I have not found any Senator in the President's party who has been at all reluctant to seek out minorities and women as possible candidates.

Senator **Leahy**. But there are 15 States not enlightened enough to elect a Senator of the President's party and so you don't hesitate to go and look into those States.

Attorney General **Meese**. We talk with——

Senator **Leahy**. Do you look at minorities and women in those States?

Attorney General **Meese**. We do look for them and we talk with the congressional delegations and we also seek counsel from them in those States.

Senator **Leahy**. My time I understand is up, Mr. Chairman. I appreciate your courtesy and Senator Specter's courtesy, that I may go before. I am going to have a number of other questions in this area for you, Mr. Attorney General. I do want you to know, though, as I have told my colleagues, I take the role of our bar efforts in looking at judicial nominees very, very seriously. It is not going to be, as some have suggested, a star chamber or anything else. That is not my nature, nor is it the nature of the other Senators here.

I would appreciate whatever cooperation we can receive from you. I also want you to know that you will receive cooperation back from me. Thank you.

Attorney General **Meese**. Thank you. And I assure you that you will have complete cooperation from us in this effort.

The **Chairman**. General, one follow-up: Does the same rule apply to the Justice Department as it relates to the answer you gave to Senator Leahy, that it would be inappropriate for us to ask a prospective nominee what his or her position would be on the outcome of a case or a specific issue?

Attorney General **Meese**. I would believe so, yes.

The **Chairman**. Thank you.

Senator Specter?

Senator **Specter**. Thank you, Mr. Chairman.

Attorney General Meese, there have been questions raised during the confirmation hearings of Robert Gates relating to the issue of intelligence findings. Because of time constraints, let me summarize the three principal issues I see and ask for your judgment as the chief law enforcement officer and the number one Federal lawyer.

The first issue relates to whether under the Hughes-Ryan amendment the finding needs to be in writing. It seems to me that if the finding requirement is to have any vitality the finding has to be in writing so that there is no question about whether or not there was a finding.

The second aspect of the issue is whether you can have a finding which retroactively covers activity which has already come to pass. Here again in my judgment, as a lawyer and as a member of the Intelligence Committee, if a finding is to have any vitality you cannot do it later and have it filed retroactively.

And the third issue which has come up in the context of the Iran matter is whether a finding was necessary in a context where the CIA obtained clearance and provided a CIA proprietary plane to carry arms to Iran. Now, for the purpose of this question, I do not want to get into the matter of whether the CIA knew or did not know that arms were being carried. I think the record will show after careful analysis what the CIA did, but on these three key issues it seems to me we need direction from the number one Federal lawyer and I would ask for your judgments on these 3 points.

Attorney General **Meese**. On each of these questions, the answer of course has to be somewhat tentative because it is hard to give a generalized answer which necessarily could be changed by particular circumstances.

As far as whether a finding has to be in writing, the law itself does not provide that a finding has to be in writing. As a matter of fact, the word "finding" in itself is kind of an institutionalization of what the law requires. The law says that no actions by the CIA which we do not involve obtaining intelligence can be carried out unless the President finds that these actions are in the national interest and are required by the national interest. That is how the word "finding" gets its derivation in this context.

I would say, however, that I would recommend to a President for a number of reasons, not the least of which is so that there can be a clear record that he has made such a finding, that it be in writing, and I have never suggested myself that it would be either wise or proper to do anything but have a finding in writing and I think that is what I would always recommend to a President that he do.

Second, as to a retroactive finding, again there may be circumstances that would perhaps permit a retroactive finding. However, my advice to a President would deal with the fact that since the law says that nothing shall be done unless the President has found it to be in the national interest, I would avoid, unless there is some extraordinary circumstances that do not come to mind at the present time, doing anything that would be retroactive.

Third, as to whether a finding was necessary as to what the CIA did, I cannot answer you precisely because the facts of that matter have not been presented with a great deal of precision. The——

Senator **Specter**. Assuming that the CIA knew that there were arms on the proprietary plane and they were getting a flight clearance from Portugal.

Attorney General **Meese**. If they knew there were arms and they were getting a flight clearance and therefore were participating in the transfer of arms, then I think under those circumstances there probably would be a finding necessary. However, whether those are the proper premises for the question, that has not yet been determined.

Senator **Specter**. Attorney General Meese, shifting now to the issue of the independent counsel, it would be my hope that there would be vigorous defense by the Department of Justice of the statute's constitutionality. Having some experience as a prosecutor and having studied the law, it is my legal judgment that the law is consitutional.

I am personally very much concerned about what will happen if there is a collateral appointment of an independent counsel as an employee of the Department of Justice. That would suggest a flaw in the statute and it seems to me that defense counsel will then raise an issue that everything the independent counsel has already done is illegal, ultra vires, and tainted, and that will result in a long series of legal maneuvers by every defense lawyer to strike down anything which has passed before. So I would urge you to defend the independent counsel strenuously and try to uphold it so that we don't run into the issue with so many of the matters already investigated, that they are ruled out as a matter of law.

Do you have any thought as to potential problems of——

Attorney General **Meese**. Well, without going into great detail now, you can be sure that we will be handling this matter in a way which will not only enable the Independent Counsel to go forward in their various matters, but also to preserve the fruits of their labors in the past.

Senator **Specter**. Do you concur in the assessment that there is a real potential legal problem if there is a new appointment of independent counsel as to the legality of all of the action that has already been undertaken?

Attorney General **Meese**. It is possible that there could be, and would vary in each case, since we do not know precisely what an Independent Counsel has done to date. This would be a matter of consultation with each of the counsel that are working on the various cases.

Senator **Specter**. Well, in the context where everything is challenged, and nobody can quarrel with a defense lawyer for doing all of that, with a taint on all of the law, it seems to me that that would be an enormous problem which can be avoided if we stick with the current law and try to uphold its constitutionality.

Attorney General Meese, let me shift now to a question on the activities of the Department of Justice in seeking the extradition of Hamadei from West Germany. There are some indicators that the West Germans may be shifting their position.

Originally, it appeared that Hamadei would be extradited for the murder of Navyperson Stetham in the hijacking of the TWA plane. Given the very sound evidence, that crime calls for a life sentence under U.S. law, while maximum sentence under German law is 6 months. There is a real concern that I have as to what our allies may be doing going back to the hijacking of the Achille Lauro when the Italian authorities released Abbas-Abdul. Prime Minister Craxi said that that release had been made in part, perhaps principally, on the assistance of President Mubarak and Yassa Arafat who were on the telephone with him. Later after the principal terrorist was released the Italians obtained a warrant for his arrest which was absolutely no good because they had him in their hands and then they let him go.

So I would urge that we make every effort to get Hamadei back. Although I think it is not irrelevant that the United States is making such enormous contribution to NATO and that these are delicate matters, if we are to be successful in our fight against terrorism, I think we have to be dogged and insistent to get cooperation and get somebody like Hamadei back to this country for trial. This is necessary if all of the new laws which we passed on extraterritorial jurisdiction are to have any meaning. I would be interested in your comments.

Attorney General **Meese**. We have done so. We vigorously have made every effort and will continue to do so to be sure that the extradition of Mr. Hamadei goes through.

Senator **Specter**. I still have 2 minutes left and since the Chairman is not here, maybe I will even have some more time. I want to explore with you——

Attorney General **Meese**. The Chairman has returned now.

Senator **Specter** [continuing]. Explore with you the subject matter of our use of extraterritorial jurisdiction and our arrest procedures, an area which has been publicly illuminated and I think needs more illumination. You testified on this subject a year ago. Yesterday, Director Webster testified about our use of the legal procedure which has been sanctioned by the Supreme Court of the United States in *Kerr* v. *Illinois* and in an opinion by Justice Black to take people into custody in foreign lands. Some people have called it kidnapping, I think that is a wrong characterization. It is a legitimate use of extraterritorial jurisdiction to execute a warrant of arrest after an indictment has been returned finding probable cause of a violation of U.S. law properly.

I would ask for your comments about the propriety of such use of the warrant of arrest under very carefully controlled circumstances where we do not offend a friendly nation where extradition is possible and do not act precipitously, do not start a war, but use it as a method of the least possible force to take into custody these terrorists and bring them back to the United States for trial.

Attorney General **Meese**. Well, our policy is to use every legal method to apprehend fugitives, and particularly terrorists wherever they may be found. Usually we have been very fortunate in having the cooperation of other countries and their police forces. To the extent that it is legal in those cases where the police, either for their own reasons or because they for other reasons would prefer for us to operate on our own, we would use every legal means to make such apprehensions, as you have suggested.

Senator SPECTER. My time is now up, Attorney General Meese. I would ask unanimous consent that an opinion on the use of extraterritorial arrest procedures by Commander Fessler be made a part of the record.

The CHAIRMAN. Without objection.

[The article follows:]

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EXTRATERRITORIAL APPREHENSION
AS A PRO-ACTIVE COUNTERTERRORISM MEASURE

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20 June 1986

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AD-B105130L

REPORT DOCUMENTATION PAGE

1a. REPORT SECURITY CLASSIFICATION
UNCLASSIFIED

1b. RESTRICTIVE MARKINGS

2a. SECURITY CLASSIFICATION AUTHORITY

2b. DECLASSIFICATION / DOWNGRADING SCHEDULE

3. DISTRIBUTION / AVAILABILITY OF REPORT
Limited to US Gov't Agencies only.
S/A 15 SEP 1986

4. PERFORMING ORGANIZATION REPORT NUMBER(S)
86-22

5. MONITORING ORGANIZATION REPORT NUMBER(S)

6a. NAME OF PERFORMING ORGANIZATION
Advanced Research Program

6b. OFFICE SYMBOL (if applicable)

7a. NAME OF MONITORING ORGANIZATION

6c. ADDRESS (City, State, and ZIP Code)
Naval War College
Newport, RI 02841-5010

7b. ADDRESS (City, State, and ZIP Code)

8a. NAME OF FUNDING / SPONSORING ORGANIZATION

8b. OFFICE SYMBOL (if applicable)

9. PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER

8c. ADDRESS (City, State, and ZIP Code)

10. SOURCE OF FUNDING NUMBERS

PROGRAM ELEMENT NO	PROJECT NO	TASK NO	WORK UNIT ACCESSION NO

11. TITLE (Include Security Classification)
Extraterritorial Apprehension as a Pro-Active Counterterrorism Measure

12. PERSONAL AUTHOR(S)
Pessler, E. Anthony, CDR, USN

13a. TYPE OF REPORT
FINAL

13b. TIME COVERED
FROM ______ TO ______

14. DATE OF REPORT (Year, Month, Day)
86, Jun,

15. PAGE COUNT
206

16. SUPPLEMENTARY NOTATION

17. COSATI CODES

FIELD	GROUP	SUB-GROUP

18. SUBJECT TERMS (Continue on reverse if necessary and identify by block number)
Extraterritorial Apprehension, Abduction, Kidnapping, Counterterrorism--Law or Legal, Irregular Rendition, Extraordinary Apprehension,

19. ABSTRACT (Continue on reverse if necessary and identify by block number)

This study evaluates a counterterrorism measure under which the United States would forcibly apprehend international terrorists in stateless areas or certain sanctuary states without the consent of the sovereign authority for the area in which they are located. "Extraterritorial apprehension" as it is developed in this study, offers a pro-active counterterrorism measure which expands the reach of US domestic criminal law so that it can be more effectively used to prosecute international terrorists who direct their attacks against the United States, its nationals, institutions, and allies. As in the case of other counterterrorism measures involving coercion, this option has significant costs and benefits. A major objective of the study is to analyze these costs and benefits in the context of US domestic and international interests. The study discusses the underlying legal, political, and operational considerations which must be understood in conjunction with

20. DISTRIBUTION / AVAILABILITY OF ABSTRACT
☒ UNCLASSIFIED/UNLIMITED ☐ SAME AS RPT ☐ DTIC USERS

21. ABSTRACT SECURITY CLASSIFICATION
UNCLASSIFIED

22a. NAME OF RESPONSIBLE INDIVIDUAL
Head, Advanced Research Program

22b. TELEPHONE (Include Area Code)
(401) 841-3304

22c. OFFICE SYMBOL
30B

DD FORM 1473, 84 MAR
All other editions are obsolete

SECURITY CLASSIFICATION OF THIS PAGE

U.S. Government Printing Office: 1985

0102-LF-014-6602

UNCLASSIFIED

20. Abstract (continued):
performing a cost/benefit analysis of this counterterrorism measure. It examines the permissibility of extraterritorial apprehension under both US domestic and international law. In addition, it reviews an extensive range of policy, organizational, and operational factors arising before and after the apprehension which could impact on the planning and decision-making process. While identifying limitations applicable to extraterritorial apprehension as a counterterrorism measure, the study finds that under specified circumstances, this option is legally permissible, politically acceptable, and operationally feasible. It concludes that as a pro-active counterterrorism measure, extraterritorial apprehension presents the United States with an effective option offering significant benefits at an acceptable cost. The study recommends that the US National Security Council Interdepartmental Group on Terrorism recommend adoption of extraterritorial apprehension as a pro-active counterterrorism measure available to the President.

18. Key Words (continued): International law - counterterrorism, International law - self-defense, Pro-active counterterrorism.

EXECUTIVE SUMMARY

1. Subject. Study evaluates a pro-active counterterrorism strategy option under which the United States would forcibly apprehend international terrorists in certain defined foreign areas without the consent of the sovereign authority for the area in which they are found. Apprehended terrorists would be transferred to the United States or an allied nation for prosecution under applicable criminal law.

2. Purpose. U.S. and Western allied counterterrorism strategies lack an effective means of reaching international terrorists operating out of: (1) areas where there is no effective, responsible sovereign authority, "stateless areas," and, (2) states which actively sponsor or support terrorism, "sanctuary states." International cooperation designed to promote aggressive prosecution and interstate extradition is of little use in reaching terrorists who operate from stateless areas and sanctuary states. Political, diplomatic, economic, and military sanctions may apply some pressure to sanctuary state regimes. However, these measures are ineffective against the mobile and highly sophisticated terrorist leadership and operational elites themselves. The proposed strategy option offers a means of reaching these key terrorist elements.

3. Scope. Study examines legal, policy, and operational considerations related to the planning and execution of "extraterritorial apprehension" as a pro-active counterterrorism measure. It examines the permissibility of this measure under both domestic and international law, identifying applicable legal doctrines and principles. In addition, it reviews an extensive range of policy, organizational, and operational factors arising before and after the apprehension which could impact on planning, execution, and criminal prosecution. Finally, it proposes a decision-making and planning system along with criteria which might be used to implement the counterterrorism measure.

4. Findings

a. Legal

- Extraterritorial apprehension is permissible under established U.S. case law doctrine which provides courts will not inquire into how the defendant is brought before them except where brutality can be imputed to the Government actions. Violations of international law are executive branch matters.
- U.S. domestic criminal law has selective extraterritorial application and could be used to prosecute international terrorists. Pending legislation which would make it crime to murder U.S. nationals anywhere is needed.
- Extraterritorial apprehension is consistent with international law of human rights.

- Intervention into stateless areas and sanctuary states can be justified under inherent right of individual and collective self-defense recognized under customary international law and by Article 51 of U.N. Charter.

- Other legal issues can be resolved.

b. Considerations Before Apprehension

- Legal and political considerations militate in favor of developing working partnership between executive and legislative branches in developing counterterrorism policy and strategy. Such partnership would resolve possible problems which could arise in immediate case arising out of requirements of War Powers Resolution and intelligence oversight legislation requiring Executive consultation with the Congress.

- Existing procedures used by Department of Justice, if enhanced by greater support from intelligence community, could be used to construct cases for criminal prosecution of apprehended international terrorists.

- Limits on military and CIA involvement in law enforcement would have to be addressed by planners, but can be overcome.

- Close allies should be consulted in advance and measure thoroughly explained after first use to nonaligned and Socialist bloc states.

c. Considerations After Apprehension

- Use and protection of intelligence information, sources, and methods is key concern but can be resolved under provisions of Classified Information Procedures Act and other authority available to trial court.

- No defense available to defendant terrorist at trial is likely to succeed if apprehension properly planned and executed.

- Countervailing action by terrorists and sanctuary states probable in aftermath of apprehension but represents no worse threat than that experienced in response to other pro-active counterterrorism measures. With thorough planning, effects can be minimized.

- Criminal and civil liability of apprehending government and its agents is unlikely to be significant detracting factor.

5. Conclusion. Extraterritorial apprehension is effective means of directly attacking two principal elements of international terrorism's center of gravity: (1) sanctuary states and stateless areas which provide support and safe-haven and, (2) network of leadership and operational elites responsible for organization, recruitment, funding, and execution of

international terrorism. Proposed measure is legally permissible, politically consistent with U.S. values and policy, and operationally feasible. It offers relatively cost effective use of resources which offers maximum benefit when compared to other pro-active counterterrorism strategy alternatives. There is strong Congressional support for such an approach.

6. Recommendation. That the National Security Council Interdepartmental Group on Terrorism strongly recommend that the President adopt extraterritorial apprehension as a U.S. pro-active counterterrorism measure.

QUALITY INSPECTED 1

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Availability Codes
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B-3

Abstract of

EXTRATERRITORIAL APPREHENSION AS A PRO-ACTIVE COUNTERTERRORISM MEASURE

This study evaluates a counterterrorism measure under which the United States would forcibly apprehend international terrorists in stateless areas or certain sanctuary states without the consent of the sovereign authority for the area in which they are located. "Extraterritorial apprehension" as it is developed in this study, offers a pro-active counterterrorism measure which expands the reach of U.S. domestic criminal law so that it can be more effectively used to prosecute international terrorists who direct their attacks against the United States, its nationals, institutions, and allies. As in the case of other counterterrorism measures involving coercion, this option has significant costs and benefits. A major objective of the study is to analyze these costs and benefits in the context of U.S. domestic and international interests. The study discusses the underlying legal, political, and operational considerations which must be understood in conjunction with performing a cost/benefit analysis of this counterterrorism measure. It examines the permissibility of extraterritorial apprehension under both U.S. domestic and international law. In addition, it reviews an extensive range of policy, organizational, and operational factors arising before and after the apprehension which could impact on the planning and decision-making process. While identifying limitations applicable to extraterritorial apprehension as a counterterrorism measure, the study finds that under specified circumstances, this option is legally permissible, politically acceptable, and operationally feasible. It concludes that as a pro-active

counterterrorism measure, extraterritorial apprehension presents the United States with an effective option offering significant benefits at an acceptable cost. The study recommends that the U. S. National Security Council Interdepartmental Group on Terrorism recommend adoption of extraterritorial apprehension as a pro-active counterterrorism measure available to the President.

PREFACE

This study was undertaken with no preconceived notions as to the desirability, permissibility, or feasibility of extraterritorial apprehension as a pro-active counterterrorism measure. While the author's professional experience in international law clearly influenced the focus of the study, an important fundamental assumption helped to ensure the analysis remained open and inclusive as opposed to narrow and exclusive in its approach. The underlying assumption was that extraterritorial apprehension had to be evaluated from the multiple perspectives of policy, law, and operational feasibility. Very simply, the assumption was made that any worthwhile counterterrorism measure had to satisfy major concerns in each of these three areas as a precondition to receiving serious consideration by U.S. national decision-makers.

Source material for this study consisted of both applicable literature and a series of interviews with U.S. Government officers having various responsibilities in developing and executing counterterrorism policy. The vast majority of legal literature with any bearing on the subject addresses the issue in terms of the "abduction" of criminals and the permissibility of such action under domestic and international law. With few exceptions, this literature concludes that such abductions are impermissible and counterproductive to the interests of the prosecuting state. This study does not directly challenge the majority of these findings, but suggests that in the context of international terrorism, it is essential to consider the interests of the world community, individual states, and the persons who are increasingly the victims of senseless acts of violence. To conclude that states may not reach beyond their borders in the absence of formal extradition processes to protect their vital interests and to arrive at that conclusion by focusing primarily on the interests of the apprehended terrorist as a defendant, is to misunderstand the nature of the minimum world public order system. International law in the evolving minimum world public order system is reflective of both the exclusive values of nation states in protecting their own vital interests as well as the inclusive interests of the whole community of nations in maintaining global peace and security.

The findings, conclusions, and recommendations which result from this study are solely those of the author. They in no way reflect the views of individuals interviewed or their departments, agencies, or the members of Congress they may serve. Nevertheless, the dedicated government officers in both the executive and legislative branches who participated and gave so freely of their time, greatly influenced the direction and outcome of what follows. In light of the sensitivities related to U.S. counterterrorism policy and strategy, it has not been possible in all instances to specifically identify the source of interview-based information contained in this study. However, let there be no doubt that those government officers working in this area are committed to the U.S. counterterrorism mission and have unambiguous perceptions of what needs to be done and how to do it.

In presenting this study, the author wishes to express his particular appreciation to faculty members Professor George Bunn, Lieutenant Colonel William R. Farrell, U.S. Air Force, and Captain James D. Brush II, JAGC, U.S. Navy of the Naval War College at Newport, Rhode Island. The advice and expertise rendered by each of these gentlemen was invaluable throughout the course of study. As important, was the encouragement and support of my very understanding and patient wife Sherrie, to whom I dedicate this enterprise.

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EXTRATERRITORIAL APPREHENSION
AS A PRO-ACTIVE COUNTERTERRORISM MEASURE

CHAPTER I

DEVELOPING A COUNTERTERRORISM STRATEGY

> [T]he United States needs an active strategy for dealing with ambiguous warfare. We must be better prepared intellectually and psychologically as a nation; we must be better prepared organizationally as a government. Many important steps have been taken, but more needs to be done. [1]
>
> Secretary of State George P. Shultz
> January 15, 1986

The Challenge

In February of 1986, in response to an unrelenting onslaught of savage terrorist attacks against the citizens and institutions of both the United States and its Western allies, a Vice Presidential task force published an important report on combatting terrorism. The task force of senior government officials reported that Americans view terrorism as one of the most serious problems facing the United States Government today. The report cited the growing threat from increased terrorist activities against U.S. citizens and interests abroad, noting that in 1985 alone, there were 812 international terrorist incidents, with a loss of 926 lives, including 23 Americans, a decidedly upward trend from the preceding year.[2]

Among the many specific recommendations developed to improve U.S. counterterrorism policy was one calling for the more effective application of law as an instrument in the war against terrorism:

Study the Relationship between Terrorism and the Domestic and International Legal System

> International and domestic legal systems are adequate to deal with conventional war and crime. However, on occasion, questions of jurisdiction and authority arise when it comes to terrorism. For example, there are ambiguities concerning the circumstances under which military force is appropriate in dealing with terrorism. The lack of clarity about international law enforcement relationships and legal systems could limit government's power to act quickly and forcefully. The Departments of State and Justice should encourage private and academic study to determine how international law might be used to hasten--rather than hamper--efforts to respond to an act of terrorism.[3]

What the Vice Presidential Task Force did not address, is how to better apply domestic and international law to win the war against terrorism. The fact is, to date, one of the most fundamental of American institutions, the legal system, has been little used as a counterterrorism measure. Instead, the United States and its Western allies have relied heavily on political, diplomatic, economic, and as of April 1986, military sanctions. Unfortunately, even the increased commitment to the cooperative application of such sanctions is unlikely to turn the tide in favor of those combatting terrorism.

The historical case in support of winning a war through the use of such sanctions is not a particularly persuasive one. Karl von Clausewitz teaches in his incomparable treatise on the policy and strategic implications of armed conflict, On War, that victory can be achieved only through decisive and offensive measures directed at what he refers to as the enemy's "center of gravity."[4] If von Clausewitz is correct and indeed the United States and the allied Western democracies are engaged in a true war against terrorism, then victory will only be achieved by undertaking clear decisive and offensive measures against the center of gravity of this international menace.

The first step is to identify that center of gravity that was so important to von Clausewitz in building a strategy of warfare. In the case of international terrorism in the 1980's, there are two critical elements to that center of gravity. The first is the mutually supportive network of states which covertly sponsor, and in some cases even direct, international terrorism in its war against the democratic states. The second critical element is the leadership and operational elites within the terrorist organizations which mastermind the attacks, recruit the disaffected, and maintain the discipline of individual units. These two elements form the center of gravity which the United States and its allies must destroy if the war against terrorism is to be decisively won.

The sanctions now being applied in the war against terrorism are largely directed against the state sponsorship element of the enemy's center of gravity. Even if the sanctions can be effectively applied, there is little reason to believe that they will have a direct or lasting impact on the committed, radicalized terrorist networks themselves. Counterterrorism measures must be found which effectively address both elements of the center of gravity. It is necessary to reach the leadership and operational elites responsible for the lethal functioning of the terrorist networks themselves. One of the instruments available which has the potential for attacking both elements of the enemy's center of gravity is domestic and international law enforcement.

To the extent it has been used, law enforcement has proven effective as a counterterrorism measure. When terrorists have been located within the jurisdictiion of the United States or a nation committed to holding terrorists accountable for their acts, criminal prosecution has been used to punish the offenders. However, the application of the criminal justice system has been frustrated by both voids in the law which is used to prosecute the terrorists and the inability of responsible states to gain physical custody over the terrorist offenders. The application of that domestic criminal law which has been developed to address terrorism has often been prevented by the fact that terrorists tend to operate and stage their attacks from areas well beyond the effective reach of those states committed to criminal prosecution. The essential challenge is to develop domestic criminal law to the fullest extent so that it applies to terrorists operating beyond state borders and then to find a permissible means of securing jurisdiction over such terrorists so that they can be effectively prosecuted under that law.

Jurisdictional Base for Building an Effective Criminal Law

Internal law has historically favored two bases of jurisdiction for nation states seeking to apply their domestic or so-called "municipal" criminal law. The most traditional jurisdictional principle is that of territoriality. Under this principle, a state is authorized to regulate and proscribe conduct within its territorial borders applicable to all persons found therein. A slight modification of this principle is the principle of quasi-territorial jurisdiction under which a state may selectively proscribe or regulate criminal conduct beyond its territorial borders but only under circumstances which are arguably extensions of its territory as in the case of vessels and aircraft registered to the state and which bear its national character. Also widely accepted is the jurisdictional principle of nationality. Under this principle, a nation state is entitled to regulate and proscribe the conduct of its nationals without regard to the situs of such conduct.

In the case of many acts of international terrorism, these accepted jurisdictioinal principles have often been of little use. Terrorist acts committed beyond territorial borders by foreign nationals cannot be prosecuted through criminal law based on either the territoriality or nationality principle of state jurisdiction. To cope with this circumstance, states victimized by international terrorism have sought to extend the reach of their criminal justice systems through the application of alternative bases of jurisdiction recognized in varying degrees by international law. One of three major alternative bases of providing for extraterritorial jurisdiction is the passive personality principle. Under this principle, a nation applies its criminal law beyond its borders in circumstances where its nationals, their property, or institutions having a national character have been the subject or victim of the offense, particularly one of a violent nature. This basis of extraterritorial jurisdiction has not been greatly favored in the international legal and political community which fears the potential for state interference with the legitimate and perhaps greater interests of other states. Nevertheless, the principle has been gaining favor as a means of justifying the enactment of criminal laws which can be used to prosecute acts committed beyond state borders by foreign nationals. Israeli criminal law made an assertion of extraterritorial criminal jurisdiction based upon this principle in 1972.[5] The French adopted a similar provision in 1975, but found it did not apply retroactively against the notorious Palestinian terrorist Abu Daoud who had to be subsequently released from custody notwithstanding his violation of a law founded on the principle of passive personality.[6]

The United States has generally not favored the passive personality principle as a basis for justifying the extraterritorial application of its criminal law. However, section 402 of the authoritative American Law Institute, Restatement of the Law Second, may signal a reversal in this traditional U.S. perspective. A Restatement provision recognizes a state's right to prescribe law with respect to "conduct outside its territory which has or is intended to have substantial effect within its territory."[7] Moreover, as will be discussed, recent U.S. Congressional legislation seems to have relied, at least to some extent, on the passive personality basis of extraterritorial jurisdiction.

A second alternative jurisdictional principle which recognizes a state's right to extend its municipal law to foreign nationals found beyond its borders is based on the necessity to defend or protect key national interests. Referred to as the "protective principle," this basis allows a state to extend its municipal criminal law to offenders who commit acts which undermine the integrity of the state itself, its vital institutions, and in particular, its national security interests. To be credibly applied, this principle requires a reasonable nexus between the criminal conduct and fundamental national interests, particularly those related to national security or the very existence of the nation state. The United States Congress has favored this principle as a basis for extending U.S. criminal jurisdiction to proscribe the conduct of foreign nationals in overseas areas. The protective principle appears to be the primary jurisdictional basis for the Comprehensive Crime Control Act of 1984 which implements several international conventions designed to suppress a range of terrorist acts.[8]

The principle of "universal jurisdiction" constitutes the third major basis recognized in international law for states extending their municipal law beyond territorial boundaries to foreign nationals. Universal jurisdiction is predicated on the theory that certain types of conduct are so reprehensible and destructive of the civilized world order, that they are proscribed without regard to where committed or the nationality of the offender. This jurisdictional principle is most typically associated with piracy on or over the high seas and war crimes. Some legal theorists have recently made persuasive arguments that international terrorism, international narcotics trafficking, and certain other kinds of conduct should be brought within the penumbra of universal criminal jurisdiction. If their argument prevails, terrorism may one day be subject to prosecution by any nation having personal jurisdiction over the offender without regard to his nationality, the location of the offense, or the nationality of the victim.

The recent development of several major antiterrorism conventions demonstrates a growing commitment by responsible nations to apply municipal criminal law to counteract international terrorism. Typical of these conventions are the International Convention Against the Taking of Hostages[9] adopted December of 1979, and the Convention on Offenses and Certain Other Acts Committed on Board Aircraft,[10] adopted in September of 1963. Despite the mutual commitments made in these conventions to prosecute or extradite international terrorists, most recognized authorities on international law still maintain that no customary or conventional law standard has as yet arisen which would justify the application municipal law based on the principle of universal jurisdiction. Unfortunately, there still appears an inadequate international consensus as to when particular acts constitute prosecutable acts of terrorism. As will be noted subsequently in this study, recent actions within the United Nations coupled with the increased interest of states in the multilateral antiterrorism conventions may very soon provide the basis for asserting that at least the more violent acts of terrorism are crimes against humanity and subject to the application of universal extraterritorial jurisdiction.

Although they must be applied with discretion, these principles of extraterritorial jurisdiction are providing a foundation upon which the United States and its allies are extending the reach of their substantive criminal law. By invoking one or more of these extraterritorial bases of jurisdiction, national legislators are broadening the municipal criminal law so as to make it applicable to foreign national terrorists who commit their acts beyond the territorial limits of the state. The problem which remains is how to secure physical custody over the terrorist offender. The preferred method of securing such custody has been by means of either regional or bilateral extradition treaties. Alternatively, less formal methods can be employed to transfer criminal offenders from the state in which they are found to the prosecuting jurisdiction. The transfers may be done with the express or tacit consent of the state in which the criminal offender is found, often referred to as the "asylum" or "sanctuary state."

In some instances, the transfers have been accomplished covertly and in the absence of even tacit consent from the asylum state.

Villanova University Law Professor John F. Murphy in Punishing International Terrorists provides a comprehensive legal analysis of the various methods of "rendition" which he defines as the "generic term" for the return of alleged offenders to the "requesting country" or prosecuting state.[11] Professor Murphy concludes in his analysis of rendition, prosecution, and punishment of terrorists, that the application of criminal law is ultimately dependent upon at least some form of consent by the state in which the terrorist is found. In Professor Murphy's view, forcible removal of an alleged terrorist offender in the absence of some form of consent or acquiescence from the asylum state would be unlawful as a matter of international, if not domestic, law. The term he applies to forcible seizures conducted in the absence of asylum state consent is "irregular rendition." In referring to forcible seizures accomplished without asylum state consent, this study will also employ the term "irregular rendition."

Professor Murphy and others who share his perspective, conclude that the principle of the inviolability of state territorial integrity, coupled with the important individual rights guaranteed in the expanding international law of human rights, legally preclude most, if not all, irregular renditions. As an alternative, these publicists advocate the increased development and use of bilateral and multilateral extradition treaties under which states commit themselves to either prosecute or formally transfer terrorists to other states with an interest in doing so. Extradition is accomplished with the consent of states parties to the treaties and typically involves no question of excessive or unreasonable force being applied to the offender being transferred.

Current U.S. counterterrorism policy supports the concept of increased use of this formal mechanism for extending the application of municipal criminal law. The U.S. Government has actively participated in developing the multilateral antiterrorism conventions which require states to prosecute or extradite terrorists. It strongly encourages nonsignatory states to accede to these conventions. Moreover, the Reagan Administration has repeatedly expressed its commitment to developing extradition treaties which substantially curb the availability of the troublesome "political offense exception." Under this exception, some terrorists have been successful in preventing their extradition from the asylum state based on claims that their activities were not criminal but "political" in nature. Courts in the United States and elsewhere have all too frequently honored these claims and allowed the political offense exception as an effective bar to extradition. Some of the most notorious of these cases have occurred within the United States itself where courts have honored the claims of members of the Irish Republican Army opposing their extradition to the United Kingdom on serious criminal charges.

The United States, its Western allies, and other responsible states have made substantial progress in improving the level of international cooperation for the purpose of extending criminal sanctions to acts of terrorism committed beyond state borders. There is cause for much optimism that the trend toward greater cooperation will continue and that more and more states will see it in their interest to join the antiterrorism conventions. However, even with the favorable prospects for better international cooperation, serious barriers to achieving effective, comprehensive international law enforcement will persist. One of the most serious of these barriers is the all too common problem of the terrorist group which operates out of an area where there is little or no effective government control, what this study will refer to as a "stateless area." Perhaps even more troublesome is the terrorist organization which enjoys the overt or covert protection and support of a sanctuary state regime. In either case, increased international cooperation offers little prospect of reaching terrorist offenders with municipal criminal law in these areas.

Secretary of State George P. Shultz in a major policy address in New York City in October of 1984 referred to the problem in these terms:

> The heart of the challenge lies in those cases where international rules and traditional practices do not apply. Terrorists will strike from areas where no governmental authority exists, or they will base themselves behind what they expect will be the sanctuary of an international border. And they will design their attacks to take place in precisely those "gray areas" where the full facts cannot be known, where the challenge will not bring with it an obvious or clear-cut choice or response. 12

All the efforts to extend the coverage and jurisdictional reach of U.S. and allied criminal law, all the diplomatic initiatives to improve the level of international cooperation through the development of better extradition vehicles, and all the political, economic, and even military sanctions, offer little prospect of coping with the problem Secretary Shultz identified in his address. If the problem of sanctuary states and "gray areas" is to be resolved, it will be necessary to find a means by which terrorists can be reached in these sanctuaries. These areas and the terrorist leadership and operational elites operating freely within them must be reached by effective counterterrorism measures if the West is to truly destroy the enemy's center of gravity.

Fortunately, the very national and international political and legal systems which are under unrelenting attack possess the means to respond. Although various "pro-active" counterterrorism measures including the use of preemptive military force are now being applied, as noted, not all appear to have the potential to effectively destroy the enemy's true center of gravity. This study proposes serious consideration be given to a measure which has been largely ignored in the rapid development of alternative counterterrorism strategy options. Misunderstandings and even false assumptions as to both law and policy have precluded a close examination of a measure which offers genuine potential for undermining the sanctuary states and stateless areas while simultaneously striking at the leadership and operational elites of international terrorism staging from within the borders of such states and areas.

What is proposed and will be examined in this study is the forcible apprehension of international terrorists in those stateless or so-called "gray areas" and sanctuary states from which they now operate. Such seizures would be directed by the United States or another responsible state wishing to acquire criminal jurisdiction over the alleged terrorist offender and would be conducted without the consent or acquiescence of the asylum or sanctuary state regime if one exists. In describing this proposed pro-active counterterrorism measure, this study employs the term "extraterritorial apprehension" as a means of distinguishing it from the broader range of seizures which Professor Murphy calls "irregular renditions." What will be examined is a highly selective type of rendition action designed for use against international terrorists who project their violence from a limited number of stateless areas and sanctuary states.

The pro-active counterterrorism measure proposed must be reviewed in terms of both its domestic or municipal law as well as international law implications. Since no worthwhile political or military strategy can be sensibly developed outside its factual and operational context, close attention must also be given to the practical aspects of such an approach to combatting the terrorist threat. A counterterrorism measure which appears politically acceptable and legally defensible, may be of little value when examined in the context of the real world in which it must achieve a stated objective. The study will consider this measure in terms of its costs and benefits as well as its advantages and disadvantages when compared with alternative counterterrorism measures.

This study proposes a counterterrorism measure which would identify, locate, apprehend, and criminally prosecute members of the international terrorist leadership and operational elites previously protected by stateless "gray areas" and sanctuary states. As a point of departure for considering such an option, it is necessary to discover whether an adequate legal foundation exists upon which such a counterterrorism measure can be built.

CHAPTER II

PERMISSIBILITY AND APPLICATION OF EXTRATERRITORIAL APPREHENSION UNDER MUNICIPAL LAW

> ...[F]or mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. [1]
>
> Mr. Justice Miller for the
> Supreme Court of the United States
> Ker v. Illinois (1886)

The permissibility of extraterritorial apprehension under municipal law will generally be determined in the context of the court considering the issue of jurisdiction. If the court determines that an accused terrorist brought before it by means of a government authorized extraterritorial apprehension is not subject to the law which the prosecution is attempting to apply, or that the government's action violated fundamental rights of the defendant, it may well act to divest itself of jurisdiction. The matter of establishing and maintaining proper jurisdiction is the very foundation upon which extraterritorial apprehension as a counterterrorism measure will rest. For this reason, it is important at the outset to critically examine both the issue of subject matter jurisdiction over the offense and the propriety of the trial court's personal or in personam jurisdiction over the accused terrorist brought before it by means of extraterritorial apprehension.

Establishing Subject Matter Jurisdiction Over the Offense

Antiterrorist Offenses in the U.S. Code

With the increased public alarm in recent years over the rise of terrorism, the United States and its allies have acted to extend the reach of their substantive criminal law. It is beyond the scope of this study to provide a comprehensive analysis of the substantive criminal law which might be used by the United States and its allies as the basis for prosecuting terrorists secured through extraterritorial apprehension. Nevertheless, several of the more recent Congressional enactments as well as legislative initiatives which are currently under consideration provide a good indication of what terrorist actions are most apt to give rise to the actual application of extraterritorial apprehension as a pro-active measure.

The 1984 Act for the Prevention and Punishment of the Crime of Hostage-Taking, specifically implemented the International Convention Against the Taking of Hostages adopted by the United Nations in December of 1979.[2] The Act amended the Federal kidnapping statute to provide for federal jurisdiction over any kidnapping in which a threat is made to kill, injure, or continue to detain a victim in order to compel a third person or governmental organization to take some action. The United States has jurisdiction over the taking of hostages outside the country under this legislation: (a) if the perpetrator or a hostage is a U.S. national; (b) if the perpetrator is found in the United States, regardless of nationality; or (c) if the United States is the government coerced by the hostage-taker.

This legislation implements the Hostage Taking Convention's recognition that a state party may assert jurisdiction over hostage takers (including accomplices) on the basis of its national being taken hostage. The 1984 implementing legislation appears to be a clear assertion of extraterritorial criminal jurisdiction based upon the passive-personality principle.[3] Had the United States been able to acquire in personam jurisdiction over Abul Abbas Zaiden and five Palestinian accomplices involved in the October 1985 Achille Lauro hijacking, it is clear the U.S. Attorney responsible for prosecuting would have based the Government's case in large part upon a violation of this 1984 statutory provision.[4]

The Congress also adopted a series of amendments to 18 U.S.C. 32 during 1984 designed to expand U.S. jurisdiction over aircraft sabotage. This legislation provides for implementation of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation adopted at Montreal in September of 1971, the so-called "Montreal Convention."[5] Under the Montreal Convention, nation states are required to establish jurisdiction over certain offenses affecting the safety of civil aviation. Under the newly adopted statutory implementation of the Montreal Convention, it is a Federal offense to destroy any aircraft in the special aircraft jurisdiction of the United States, whether it is military, state-owned, or civilian. The statute also makes it an offense to commit an act of violence against any person on the aircraft, not simply its crew members, if the act is likely to endanger the safety of the aircraft. The statute and convention also provide the basis, and indeed obligation, for the United States to prosecute any person who destroys a foreign civil aircraft outside the United States if the offender is later found in the United States.

The Congress further acted in 1984 to authorize the prosecution of the murder, kidnapping, or assault of an immediate family member of certain federal officials where such crimes are committed with the intent to interfere with those officials in the performance of their duties or where the offenses are committed to retaliate against them for the performance of their duties. Under 18 U.S.C. 1114, enacted prior to 1984, the Congress had declared it a felony to kill certain federal officials, not including U.S. military personnel, acting in the performance of their duties. The 1984 enactment contained in 18 U.S.C. 115 now extends protection to immediate family members of the President, Vice President, Members of Congress, all federal judges, the heads of executive agencies, the Director of the CIA, and federal law enforcement officials.

In addition to these extensions in the U.S. substantive criminal law, the Congress acted to broaden the already existing special maritime and territorial jurisdiction of the United States contained in 18 U.S.C. 7. This well established provision in the U.S. Code recognizes a limited Federal extraterritorial jurisdiction for certain serious crimes committed in areas specified to be within the "special maritime and territorial jurisdiction." The 1984 amendment served to greatly expand the definition of that jurisdiction so that it now encompasses any place outside the jurisdiction of any nation where the offense is committed against a national of the United States. This legislative action again appears to be a Congressional expression of the passive-personality principle of extraterritorial jurisdiction as recognized in international law.

Among the offenses which may be prosecuted when committed within the special maritime and territorial jurisdiction of the United States and which often characterize terroristic conduct are arson, maiming, murder, manslaughter, attempts to commit murder and manslaughter, and malicious mischief.[6] Under 18 U.S.C. 3231, U.S. federal district courts have jurisdiction over all offenses against the United States. Pursuant to 18 U.S.C. 3238, the trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is arrested _or first brought_. (emphasis added) Neither this section nor any other within the U.S. Code limits the manner or means by which the offender is brought before the court to stand trial for a charged violation of Federal criminal law.

One further 1984 enactment now makes murder for hire a Federal crime. Under 18 U.S.C. 1952A, the United States may prosecute anyone, without regard to nationality, who travels or uses facilities in foreign commerce with the intent to murder for pecuniary compensation. Although the elements of this offense may be difficult for a prosecutor to establish in the case of an international terrorist, it may nevertheless be useful in some cases.

These and other provisions of the U.S. Federal criminal law offer prosecutors a range of offenses which may be applied against international terrorists without regard to their nationality. However, unless the statute expressly provides for its application in foreign states, U.S. courts will presume jurisdictional application is limited to no more than the special maritime and territorial jurisdiction of the United States. Except for those laws where the Congress specified extraterritorial application to include offenses committed within a foreign state, U.S. prosecutors have no substantive law with which to prosecute acts of terrorism or other crimes actually committed in a foreign country against a U.S. National.

Legislative Remedies

In general, the Congress has been cautious in extending U.S. criminal jurisdiction on an extraterritorial basis. It has preferred to extend U.S. criminal jurisdiction only where there is a discernible and direct U.S. interest.[7] To date, probably the furtherest extension of U.S. substantive criminal law with regard to terrorism has been the hostage-taking provisions in the 1984 Comprehensive Crime Control Act. The Congress has not enacted legislation to proscribe the murder, attempted murder, or the perpetration of a serious assault upon a non-official U.S. national outside U.S. borders except to the extent such offense can be tried under the newly expanded special maritime and territorial jurisdiction of the United States. State Department Legal Adviser Abraham D. Sofaer revealed that this void in the U.S. Federal criminal law frustrated efforts to bring indictments against those thought to have been responsible for the slaying of two American businessmen in El Salvador in 1985.[8]

One of the most significant legislative proposals currently under consideration in the Congress is the "Terrorist Prosecution Act." The Act is designed to amend Title 18 of the U.S. Code to authorize prosecution of terrorists who attack U.S. nationals abroad without regard to where the offense occurs or the nationality of the offender. The legislation received consideration as Senate Bill 1429 during July 1985 in hearings conducted by the Senate Judiciary Committee's Subcommittee on Security and Terrorism. The clear purpose of the legislation is to provide relatively comprehensive subject matter jurisdiction to federal prosecutors for use against international terrorists who perpetrate the most serious acts of violence against U.S. nationals abroad.

Unlike the extraterritorial jurisdictional provisions in the 1984 Comprehensive Crime Control Act which are primarily based upon the passive personality principle, the Terrorist Prosecution Act would be based upon the more widely accepted protective principle. Section 2331 of the bill contains a statement of findings and purpose for the proposed legislation:

. . . .

> (b) it is an accepted principle of international law that a country may prosecute crimes committed outside its boundaries that are directed against its own security or the operation of its governmental functions;
>
> (c) terrorist attacks on Americans abroad threaten a fundamental function of our Government: that of protecting its citizens;
>
> (d) such attacks also threaten the ability of the United States to implement and maintain an effective foreign policy;
>
> (e) terrorist attacks further interfere with interstate and foreign commerce, threatening business travel and tourism as well as trade relations.[9]

It is particularly interesting that the legislative histories for Senate Bill 1429, as well as a number of other recent bills receiving active consideration in the Congress as means of dealing with the threat of terrorism, contain numerous approving references to "abduction" or "forcible seizure" as a way of gaining jurisdiction over offenders.[10] In the final floor debate on Senate Bill 1429, Senator Arlen Spector, the bill's chief sponsor and a former prosecutor himself, argues:

> In many cases, the terrorist murderer will be extradicted or seized with the cooperation of the government in whose jurisdiction he or she is found. Yet, if the terrorist is hiding

> in a country like Lebanon, where the government, such as it is is powerless to aid in his removal, or in Libya, where the government is unwilling, we must be willing to apprehend these criminals ourselves and bring them back to trial.
>
> . . . .
>
> Forcible seizure and arrest is a strong step, but the threat of terrorism requires strong measures, and this is clearly preferable to the alternatives of sending in combat troops or bombing a few neighborhoods. 11

Senator Spector's views concerning how the Terrorist Prosecution Act might be implemented are by no means unique. During the same floor debate, Senator Leahy remarked:

> The United States needs a comprehensive counterterrorist strategy. Part of the strategy must be to improve our intelligence so that discriminate use of force against terrorists who have commited or are about to commit violent acts becomes feasible and legitimate.
>
> Our strategy must also include laws which provide for the criminal prosecution in the United States of terrorists over whom we can obtain jurisdiction through extradition and other means. 12 (emphasis added)

After considerable floor debate replete with similar endorsements of "forcible seizure" and "abduction" or what this study refers to as "extraterritorial apprehension," the Senate unanimously adopted Senate Bill 1429 on February 19, 1986 and transmitted it to the House of Representatives where it awaits consideration.

Senate Bill 1429 and other legislation addressing international terrorism is currently under consideration in the Judiciary Committee of the U.S. House of Representatives. With public concern about international terrorism running high during the 1986 election year, it is likely the Congress will enact some form of the Terrorist Prosecution Act and, by so doing, provide a powerful new law which federal prosecutors may use in the war against terrorism.[13]

A review of recent Congressional enactments and pending legislation confirms that some basis for subject matter jurisdiction already exists and the prospects for this basis being expanded in the near-term are excellent. Of even greater significance for purposes of the present study, there appears to be a significant political constituency prepared to support extending U.S. criminal jurisdiction to the maximum extent possible for purposes of reaching international terrorists located in stateless areas and sanctuary states. If the legislative history for Senate Bill 1429 and related bills as it has developed to date is any indication, this constituency is also prepared to enthusiastically support efforts by the United States and its allies to secure _in personam_ jurisdiction over terrorist offenders by means of extraterritorial apprehension. In sum, there is a positive mood in the Congress in support of such a pro-active counterterrorism measure.

Securing In Personam Jurisdiction by Irregular Rendition

The Ker-Frisbie Doctrine

Once it has been established that the terrorist's conduct has violated municipal criminal law and there exists an appropriate nexus between the United States or some other prosecuting forum state and the crime based upon one of the jurisdictional principles recognized in international law, it is necessary to consider the legality of the means of securing jurisdiction over the person of the alleged offender. Extradition agreements and other forms of rendition using informal or "irregular" means often serve as the vehicles for physically acquiring jurisdiction over the the defendant. In the United States and other Western judicial systems, the accused has the right to challenge the jurisdictional authority of the court based on the means used to acquire custody over his or her person. A considerable amount of case law has been developed interpreting the legality under municipal law of various means of rendition, irregular or otherwise. For purposes of this study, the central objective will be to understand what this case law, particularly that of the United States, holds with regard to irregular renditions.[14]

The foundation for the existing U.S. doctrine on irregular rendition was established by the United States Supreme Court in 1886 landmark decision in Ker v. Illinois.[15] Defendant Ker, then residing in Peru, was indicted in Illinois for larceny and embezzlement. Pursuant to a bilateral extradition treaty, the President of the United States issued a warrant authorizing a private investigator to secure custody of Ker from Peruvian authorities. However, the warrant could not be served due to a state of hostilities between Chile and Peru. At the time, Chilean forces had occupied the Peruvian capital of Lima. Despite these conditions, the investigator forcibly apprehended Ker and delivered him to U.S. authorities.

Ker contended that his Peruvian residence afforded him a right to asylum and that the fact an extradition treaty remained in force between the United States and Peru precluded his return other than under the terms of the agreement. He further argued that the seizure violated his due process rights under the U.S. Constitution. The Supreme Court rejected Ker's contention, holding that the existence of the bilateral extradition treaty did not necessitate the conclusion that obtaining physical custody over the offender, by means other than through the agreement, violated its provisions. In affirming Ker's conviction in the lower court, the High Court held:

> "due process of law"...is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings he is deprived of no rights to which he is lawfully entitled. [16]

As is the case with most of the decisions rendered by the courts over the past century bearing on the legal propriety of irregular renditions, the Ker holding is subject to more than one interpretation. Legal analysts displeased with the apparent willingness of U.S. courts to condone most forms of irregular rendition argue that in Ker, government authorities intended to comply with the extradition process but were precluded from doing so by reason of the exigent hostilities. Such analysts read the Ker decision narrowly, concluding that, at most, Ker stands for the proposition that U.S. courts are prepared to ratify forcible seizures by private agents under extraordinary circumstances and where the prosecuting state has no direct role.

An alternative interpretation of Ker and one which better conforms to subsequent judicial reading of the case, is that it establishes a rule under which U.S. courts may ratify irregular renditions where extradition is unavailable or precluded by exigencies in the asylum state. What is incontestable about the Ker holding is that it establishes a rule that due process of law is not jeopardized by "mere irregularities in the manner in which [a defendant] may be brought into the custody of the law".[17]

In 1952, the U.S. Supreme Court specifically upheld its ruling in Ker in a companion landmark decision involving irregular rendition within the United States. In Frisbie v. Collins,[18] the Court ruled that due process was not violated when defendant Collins was forcibly apprehended in Chicago by Michigan police, handcuffed, blackjacked, and returned to Michigan to stand trial for murder. Writing for a unanimous Supreme Court, Justice Black overturned a Sixth Circuit holding that the Federal Kidnapping Act had invalidated the Ker rule. Justice Black also rejected the defendant's contention that his due process rights had been violated:

> This Court has never departed from the rule announced in Ker v. Illinois...that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." [Footnote omitted.] No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. 19

The Frisbie decision articulated by Justice Hugo Black, often considered one of the Court's staunchest defenders of civil liberties, made clear that the Court's emphasis remained on issues of fair trial and Constitutional safeguards which it did not consider contravened by "forcible abduction," even when undertaken by government agents acting in the absence of asylum state consent.

Together, these two historic Supreme Court decisions formulate what has come to be known as the "Ker-Frisbie doctrine." With one notable exception, U.S. courts have consistently relied upon the Ker-Frisbie doctrine to retain jurisdiction over defendants apprehended by various irregular means. The facts and circumstances surrounding a series of recent cases involving forcible seizure of criminal defendants found in foreign countries vary considerably. None precisely describes the unique circumstances under which members of the leadership and operational elite of terrorist organizations would be seized under a counterterrorism measure of extraterritorial apprehension. However, several of these cases do offer important principles upon which such a pro-active counterterrorism measure can be built to ensure compliance with U.S. Constitutional and municipal law requirements.

The Toscanino Caveat

The sole exception to the continuing line of cases reaffirming the Ker-Frisbie doctrine arises from the Second Circuit Court of Appeals 1974 decison in United States v. Toscanino.[20] Toscanino, an Italian national charged with conspiracy to import narcotics into the United States, alleged in an affidavit that he and his pregnant wife were lured from their Montevideo home on January 6, 1973 by a telephone call from a Uruguayan police officer acting as a paid agent of the United States Government. He claimed he was then knocked unconscious with a gun, bound, blindfolded, and driven without the knowledge or consent of the Uruguayan Government to the Brazilian border where he was surrendered to Brazilian authorities. Toscanino further alleged that Brazilian authorities held him incommunicado and interrogated him over several days denying him food, water, and sleep. He claimed that during this period, he was subjected to acts of torture including being kicked, beaten, having electrodes attached to his extremities, and the flushing of alcohol and other fluids into his eyes, nose, and anal passage. Of particular note, he alleged that on at least one occasion, he believed a U.S. Government agent was physically present in the vicinity of the violent interrogation being performed by the Brazilian authorities. At the conclusion of the interrogation, Toscanino claimed he was taken to Rio de Janeiro, drugged by Brazilian and U.S. Government agents, and placed on a Pan American flight destined for the United States and the arms of arresting Federal agents.

The Second Circuit used Toscanino's allegations of outrageous government conduct to fashion an exception to the Ker-Frisbie doctrine. The court appeared to limit the Ker-Frisbie doctrine by applying the expanded interpretation of due process protections recognized in Rochin v. California[21] and Mapp v. Ohio.[22] to cases where in personam jurisdiction is acquired by irregular rendition. The Toscanino court recalled that in Rochin v. California, the Supreme Court relied upon the due process clause of the Fourteenth Amendment to invalidate a state court conviction won through evidence obtained by police brutality.[23] The Second Circuit reasoned that Rochin established the rule that convictions obtained by "conduct that shocks the conscience" violates the defendant's due process rights. The Toscanino court then chose to apply the exclusionary rule fashioned in Mapp v. Ohio[24] as "a judicially-created device designed to deter disregard for constitutional prohibitions...".[25] The court concluded that Rochin and Mapp represented an expansion of the due process clause which could not be reconciled with the Ker-Frisbie doctrine.[26]

At least in the Second Circuit, it now appeared that courts were required to divest themselves of in personam jurisdiction over the accused where such jurisdiction was acquired by deliberate, unnecessary, and unreasonable invasion of the defendant's Constitutional rights. Noting the gravity of the defendant's allegations and that if true they would constitute a violation of his due process rights, the court ordered an evidentiary hearing in which Toscanino was to be given an opportunity to prove those statements made in his affidavit.[27]

An important foundation for the Toscanino decision was the court's recognition that to require the Ker-Frisbie doctrine to yield to due process considerations, it would be necessary to extend the U.S. Constitutional protections to foreign nationals not within the United States at the time of the alleged violation. The court held foreign nationals are entitled to invoke Fourth Amendment protection against the U.S. Government's conduct abroad.[28] Judge Mulligan reasoned that this extension of U.S. Constitutional rights to aliens not even present in the United States was justified on the notion that the Fourth Amendment protects "people" rather than "areas" or "citizens."[29] The Judge further reasoned that the Constitution is in force whenever the sovereign power of the Government is exercised.[30]

This part of the Toscanino decision is relevant to the development and planning of extraterritorial apprehension as a counterterrorism measure. The court's broad interpretation of the scope of protection afforde by the U.S. Constitution is consistent with the trend in rulings of the U.S. Supreme Court and other federal circuit courts which uniformly hold that basic human rights protections should be accorded to all individuals, whether citizens or not, and without regard to whether or not a person is present within the United States.[31] The significant point is that the apprehended international terrorist is entitled to the full force and protection of the U.S. Constitution from the point he or she is subjected to effective U.S. Government control. The actions of U.S. Government personnel, possibly even including surrogate agents, engaged in an act of extraterritorial apprehension would have to be in substantial compliance with due process and other Constitutional guarantees afforded citizens within the United States.

In addition to basing its decision on Toscanino's constitutional rights, the Second Circuit took note of an apparent violation of the territorial sovereignty of Uruguay as guaranteed under two international agreements to which the United States was a party. While the issue of state sovereignty and whether another state has a right to breach the territorial integrity of the asylum state will be addressed in Chapter III, it is important to note this issue seems to have been raised as a basis for the court's action in Toscanino. In terms of analysis of the municipal law implications of Toscanino, it is significant that at least the Second Circuit was prepared to examine the issue of irregular rendition or what it referred to simply as "abduction," in terms of U.S. obligations to the asylum state under international law. As will be seen, the Toscanino decision has undergone substantial refinement and, at best, represents that law in only one federal circuit. Nevertheless, the court did focus on what it perceived as relevant international obligations of the United States and considered their apparent violation a basis for ruling against the Government.

Ker-Frisbie -- Reaffirmed But Refined

While Toscanino appeared to strike a blow, at least in one federal circuit, to the Ker-Frisbie doctrine, a significant body of subsequent case law has done much to ameliorate its effects. Within six months of the Toscanino decision, the Second Circuit published its opinion in United States ex rel. Lujan v. Gengler[32] in which the court's prior holdings were substantially narrowed, reinterpreted and "clarified."

Lujan, a resident of Argentina, was the subject of an outstanding U.S. Federal warrant related to his role in a conspiracy to import and distribute a large quantity of heroin in the United States. U.S. Drug Enforcement Administration (DEA) agents employed a foreign national agent who engaged defendant Lujan, a pilot, to fly to Bolivia. Once lured out of Argentina to Bolivia on the promise of attractive employment, Lujan was taken into custody by Bolivian police acting not on behalf of their own government, but as agents for the DEA. Lujan was held in Bolivia and subsequently placed on a plane bound for New York where he was arrested by waiting Federal agents.

Chief Judge Kaufman, speaking for the Second Circuit, noted that the court's prior decision in *Toscanino* could scarcely "have meant to eviscerate the *Ker-Frisbie* rule." Judge Kaufman observed that in the *Toscanino* decision, the court "did not intend to suggest that any irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court."[33] *Lujan* clearly narrowed the holding in *Toscanino*. The rule under *Lujan*, which still applies in the Second Circuit, is that absent outrageous or shocking government conduct, irregular rendition is not in and of itself a violation of due process rights.[34]

As in *Toscanino*, the Second Circuit in *Lujan v. Gengler* addressed alleged violations of international law predicated on an apparent absence of consent or acquiescence to the seizure from the asylum state. On this issue, the *Lujan* court appeared to further narrow the holding in *Toscanino*, noting that the defendant did not have a private right to raise the issue of sovereignty. Specifically distinguishing Lujan from Toscanino on this issue, Judge Kaufman wrote:

> But unlike Toscanino, Lujan fails to allege that either Argentina or Bolivia in any way protested or even objected to his abduction. This omission is fatal to his reliance upon the [United Nations and Organization of American States] [C]harters. The provisions in question are designed to protect the sovereignty of states, and it is plainly the offended states which must in the first instance determine whether a violation of sovereignty occurred, or requires redress. [35]

The court in this statement seemed to imply that "abduction" may violate international law but the asylum state may cure any real or apparent violation by its acquiescence. Moreover, the court seemed to be saying that if there is no protest from the asylum state, the court may imply consent or acquiescence. In any case, the defendant may not raise the issue of sovereignty under traditional international law since it is a questiion for the sovereigns themselves to resolve.

The Second Circuit further retreated from the Toscanino holding in its 1975 decision in United States v. Lira.[36] In Lira, the defendant, a Chilean national, was arrested by Chilean police at the request of the U.S. DEA. He alleged that thereafter he was brutally tortured at a Chilean naval base over a period of several weeks. Lira claimed that following a period of interrogation, he was taken to the airport, drugged, and put on a plane for the United States escorted by both Chilean police officers and agents of the DEA. Judge Mansfield, author of the Toscanino decision, ruled that because the defendant could not prove overt U.S. Government participation in his alleged ordeal, the district court was not required to divest itself of jurisdiction over the accused.[37] The court recalled its holding in Lujan and determined that Lira could not allege a violation of Chilean law if Chile as the asylum state was itself aware of an apparent violation of its sovereignty, yet failed to protest to the Government of the United States.[38] Based on the allegations of police brutality in this case and some suggestion of DEA involvement, it is very difficult to distinguish this set of facts from those in Toscanino. The only mildly distinguishing factor seems to be the court's position that there is no evidence to support the defendant's allegations of possible U.S. DEA involvement in the abduction and torture.

Unfortunately, none of the Ker-Frisbie doctrine line of cases specifically fits all the operative circumstances likely to arise during a U.S. Government or allied nation apprehension of a terrorist in a stateless area or sanctuary state. It is virtually certain that such extraordinary apprehensions would be conducted without the consent or acquiescence of any regime in the stateless area or sanctuary state. Sanctuary states providing overt or covert support for international terrorists operating within their borders can be expected to voice outrage and alarm at an extraterritorial apprehension being conducted within their territory.

Another circumstance which might be expected in the apprehension of international terrorists in stateless areas or sanctuary states would be the direct and substantial use of U.S. Government forces or agents. Depending upon the security threat posed by the terrorists themselves or the security forces of the local area, it may prove necessary and prudent to use military, paramilitary, or specialized intelligence agency operatives. None of the Ker-Frisbie line of cases deal with facts even remotely resembling this sort of scenario in which there could be substantial involvement of U.S. Government personnel during the extraterritorial apprehension operation itself.

Two decisions in the Ker-Frisbie line of decisions do provide at least some indication of how U.S. courts might view a case of extraterritorial apprehension with regard to the almost certain protest which can be expected from the sanctuary state. In Ex parte Lopez,[39] the petitioner was seized while in Mexico and forcibly returned to the United States for trial upon narcotics charges. The Government of Mexico intervened at trial asking that the court surrender custody of the petitioner. In support of its request, the Mexican Government cited existing treaties between the United States and Mexico which it alleged had been violated by the seizure in its territory. Notwithstanding, the Texas court stated that the Mexican Government's claim would not affect its jurisdiction. The court speculated that the Mexican Government may wish to present the matter to the executive department of the U.S. Government. As in the Lira case, the Texas court viewed the matter of sovereignty as essentially a political question to be resolved by the executive branches of the governments involved.

A more recent case involves two American bounty hunters who kidnapped Sidney Jaffe, a U.S. national, from Toronto in May of 1981. Jaffe had fled the United States to avoid prosecution by Florida state authorities for fraudulent land sales. Florida authorities instituted extradition proceedings which were ineffective due to the state's failure to follow proper procedures.[40] The bounty hunters were engaged by the bail bondsman who, in turn, was "encouraged" by Florida prosecutors to return the defendant to allow continuation of the criminal trial. The Government of Canada vigorously protested Jaffe's seizure as a violation of its sovereignty and cited the existing U.S. - Canadian extradition treaty as a basis for its objections.[41]

The Florida state court rebuffed the Canadian protest, refused to release Jaffe and convicted him of land sale violations. The court simply cited a Florida state rule permitting bounty hunters to pursue and return bail jumpers to the jurisdiction of the court. The Florida court virtually ignored the Canadian protest. The Canadian Government sought the intervention of the U.S. Department of State and demanded that the two bounty hunters be extradited to Canada to stand trial for a violation of the Canadian kidnapping statute. The two bounty hunters were subsequently extradited to stand trial in Canada.[42] In this instance, the U.S. Federal authorities appeared genuinely concerned about the apparent violation of Canadian sovereignty and the State of Florida's failure to exercise the extradition treaty to the fullest extent.

Ex parte Lopez, Jaffe, and other cases where there have been affirmative protests from the asylum state have invariably resulted in the courts retaining jurisdiction. In Lopez, the court viewed the issue as a political matter to be resolved between the executive branches of the respective national governments. In Jaffe, the state court largely ignored the issue, perhaps based on the assumption that the bounty hunters were acting independently of any state action. What these and other cases involving a state protest seem to indicate is that courts have been very reluctant to divest themselves of in personam jurisdiction once acquired. Courts have even retained jurisdiction when foreign asylum states have protested the "irregular rendition" as a violation of their sovereignty. Such in personam jurisdiction has been retained even in cases involving asylum states which have cordial relations with the United States and which are closely linked to it by treaties pledging mutual respect for sovereignty or committing the countries to the use of extradition.

United States v. Reed[43] provides still further indication as to how U.S. courts might view extraterritorial apprehension. Reed and two accomplices had been charged with mail fraud and conspiracy to commit securities and mail fraud. Prior to the selection of a federal jury in the Eastern District of New York, Reed jumped bail. Reed was tried in absentia while a fugitive. He was subsequently located in the Bimini Islands in the Bahamas where covert CIA agents lured him on board a small private plane they claimed was bound for Nassau. Once on board the aircraft, Reed alleged that one of the agents pulled a gun and made him lie on the floor. He alleged the agent held a cocked revolver to his head and threatened to "blow [his] brains out." Upon arriving in Fort Lauderdale, Reed alleged that one of the CIA agents twisted his arm badly while he was deplaning and in the process of being surrendered to waiting FBI agents. Although an extradition treaty existed between the United States and the Bahamas, there is no indication that any attempt was made to invoke it to gain Reed's return.

The court held that luring Reed onto the plane under false pretenses, the use of a revolver pointed to his head, and the threatening language was not conduct which involved "gross mistreatment" in contravention of Toscanino's due process standard.[44] The court further held that the fact the United States has an extradition treaty with the Bahamas, from which the defendant has been "abducted by CIA agents," had no bearing on the legality of the arrest where the Bahamian Government had not sought the defendant's return or made any protest. The court concluded that in the absence of any such protest, the defendant had no standing to raise a violation of international law as a justiciable issue.

Reed also asserted that his fundamental Constitutional rights were violated on the theory that any "abduction" from another country with which the United States has an extradition treaty under the coerced circumstances alleged, constituted an unreasonable seizure within the meaning of the Fourth Amendment.[45] The court found Reed's seizure pursuant to an arrest warrant issued with probable cause was "reasonable" for purposes of the Fourth Amendment. The court specifically held:

> [T]he existence of an extradition treaty provides an individual with certain procedural protections only when he is extradited. And abduction is no more or less objectionable simply because of the existence of an extradition treaty. As for the manner of the seizure, custody obtained by executing an arrest warrant is not invalidated because of the use of excessive force, even though the defendant might have a suit for damages against the government agents involved.[46]

The Second Circuit might have chosen to limit the application of the Ker-Frisbie doctrine in a manner similar to its interpretation in Toscanino but basing its analysis on Reed's argument that his Fourth Amendment rights had been violated by a forcible seizure in a country with which the United States had an extradition treaty. Not only did this 1981 decision reject this analysis, but it once again made clear that an extradition treaty does not preclude the use of forcible seizure, at least in the absence of a protest from the asylum state.

In yet another argument made to the court, Reed maintained that divestiture of jurisdiction was required under its judicial supervisory powers to curb abuses by government agerts. The defendant argued that his "abduction" at the hands of government agents "breeds contempt for the law.

mocks our stated concern for human rights, and jeopardizes our standing in the international community."[47] The Second Circuit responded to this argument noting,

> ...we see no pattern of repeated abductions necessitating exercise of our supervisory power here in the interests of the great good of preserving respect for the law. Appellant, (Reed) a fugitive from justice with no respect for the law whatsoever, is hardly in a position to urge otherwise.[48]

In this statement, the court does seem to imply that it would have reservations if it saw a "pattern of repeated abductions." However, it nevertheless approved the Government's actions and refused to divest itself of jurisdiction over the defendant. Of even greater interest, the court was quick to note the defendant's apparent lack of respect for the judicial system and seemed to balance this against the extraordinary law enforcement actions of the Government. This may signal that future courts, sitting in judgment of international terrorists who assert violations of their Constitutional and human rights, may view such claims in the context of the defendants' contempt for the rights and civil liberties of their victims.

Application of the Ker-Frisbie Doctrine to Extraterritorial Apprehension

The Ker-Frisbie doctrine remains a dynamic area of the law. It will continue to evolve and be refined in the years ahead. The line of cases interpreting and clarifying the doctrine fundamentally support irregular rendition, albeit with important qualifications bearing on the Constitutional rights of the apprehended person and the impact such actions may have on the sovereign rights of the asylum states. What is important for purposes of the present analysis is that the doctrine provides a basis in U.S. municipal law for developing extraterritorial apprehension as a counterterrorism measure. The evolving doctrine offers important standards and criteria which must be folded into any detailed operational plan designed to carry out a pro-active counterterrorism measure involving extraterritorial apprehension.

The Toscanino decision and its successors establish attainable standards of conduct for those U.S. Government or allied nation personnel and surrogate agents who may be directly involved in the apprehension operation. These decisions establish that brutality, torture, or grossly excessive and unreasonable force under given circumstances may cause a U.S. court to divest itself of jurisdiction. It is equally clear that the use of ruse, trickery, paid foreign agents, and perhaps even the administration of tranquilizing drugs to facilitate transfer of the apprehended person will not offend the sensibilities of most courts. Nor will courts necessarily examine the precise amount of force applied to effect the apprehension, so long as there is some reasonable justification for the manner and extent to which it is applied under the circumstances.

The line of Ker-Frisbie decisions include cases where the apprehension was accomplished directly by U.S. Government personnel, others where foreign agents appeared in charge, and still others where there was some vague combination of foreign and U.S. agents operating in concert. If there is any lesson to be discerned from the courts' consideration of the governmental identification or agency relationships in these various cases, it is simply that the more directly the apprehending persons are associated with the U.S. Government, the higher the standard of conduct to which they will be held. There is no question that when U.S. Government personnel are directly involved in an extraterritorial apprehension, they must conduct themselves so as not to disregard the Constitutional rights of the person being apprehended. It is also likely that foreign or private surrogate agents operating pursuant to a detailed U.S. Government plan or under the close direction of the U.S. Government will be held to an equally high standard of conduct.

The Ker-Frisbie line of decisions, starting with Ker itself, makes clear that extradition is not an exclusive remedy. The existence of an extradition treaty will not bar the court from proceeding in the case of a defendant brought before it by irregular rendition. However, the courts have recognized that irregular renditions carried out in lieu of such extradition treaties may give rise to a diplomatic protest from the asylum state at the national executive level of the government. Although the authority in this area is not well developed, there is no reason to believe that such a protest will necessarily cause the court to divest itself of *in personam* jurisdiction over the apprehended defendant. Divestiture seems a particularly unlikely possibility if the protest is made by a regime of questionable authority purporting to be the government in a stateless area or, alternatively, when the objections originate from a sanctuary state widely recognized as engaged in the state sponsorship of international terrorism.

Two issues among those considered in the Ker-Frisbie decisions remain significant points of contention. The first is the question of whether irregular rendition is permissible when the violation of the asylum state's sovereignty is accomplished through the fully authorized and intentional efforts of the apprehending state. The second issue which remains largely open is whether under the expanding international law of human rights, the apprehended defendant now has a personal right to directly protest his seizure notwithstanding the acquiescence, consent, or silence of the asylum state. Answers to these remaining issues must be derived from international law. Nevertheless, their resolution will be developed in the context of, and incorporated within, the evolving Ker-Frisbie doctrine. The answers to these issues are fundamental to the overall question of the permissibility of extraterritorial apprehension as a counterterrorism measure.

CHAPTER III

THE RIGHT OF EXTRATERRITORIAL APPREHENSION UNDER INTERNATIONAL LAW

> We must use the law to preserve civilized order, not to shield those who would wage war against it.[1]
>
> Secretary of State George P. Shultz
> January 15, 1986

The Import of International Law on Strategy Development

The foundation of contemporary international law is the concept of a minimum world public order system designed to maintain peace and security through the development of friendly relations and cooperation among nations. Implicit in the maintenance of international peace and security is the concept of equality, justice, and respect for fundamental human rights of nations and their citizenry--without regard to political, economic, and social system or level of development.[2] Sophisticated terrorist leadership elites do not subscribe to this minimum world public order system under international law. In fact, a principal objective of international terrorism is to undermine this fundamental system by whatever means possible.

Despite their contempt for the minimum world public order system, international terrorist elites and their sanctuary state sponsors have learned to cynically exploit the rights and protections afforded under international law. Ironically, these rights were established to preclude war, violence, and suffering, and are now used by international criminal elements to prevent responsible states from holding them accountable for their acts against innocent persons and peaceful institutions. Any reasonable analysis and application of international law must have as its point of departure, this fundamental understanding of the minimum world public order system and its underlying interest in the maintenance of peace and security among nations along with a guarantee of human rights for all people.

The principle of state sovereignty and concepts of human rights are two facets of international law which thus far have precluded a more intense and effective pro-active counterterrorism response. At issue is whether a state's right to territorial integrity or political independence as guaranteed under Article 2(4) of the United Nations Charter[3] applies without qualification. Does a state which enjoys Article 2(4) protection have corresponding obligations of its own and, if so, what are those obligations and to whom are they owed? Also at issue is whether the human rights guarantees which have been recognized by the United Nations itself and many regional groups of nations speaking through multilateral conventions shield the international terrorist from effective law enforcement or other counterterrorism measures. Whether or not terrorists enjoy a "state status" or "international personality," can they assert pro-active counterterrorism measures violate their fundamental human rights?

Toscanino and some of the other Ker-Frisbie decisions have raised these types of questions without satisfactorily resolving them. The resolution will be required if the United States adopts extraterritorial apprehension as a counterterrorism measure. Both the United States Constitution and Supreme Court decisions make clear that the U.S. courts are absolutely bound by international law. In its historic decision in Paquete Habana,[4] the U.S. Supreme Court stated:

> International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations...[5]

Paquete Habana confirmed the incorporation of international law within U.S. municipal law. It also established that unless provided to the contrary by federal statute, customary international law governs.[6]

The courts are mandated under U.S. common law to presume conformity between international law and U.S. Congressional enactments, unless it is unmistakably apparent that an act was intended to be in disregard of a principle of international comity.[7] Since there is no U.S. statute which either explicitly authorizes or prohibits extraterritorial apprehension, it is clear that American courts will be obligated to closely examine international law as well as their own Constitutional and municipal law-based decisions in determining the permissibility of extraterritorial apprehension as a counterterrorism measure. If extraterritorial apprehension does not comport with international law with regard to fundamental nation state rights or those human rights now being guaranteed to all persons, a U.S. municipal law court may divest itself of jurisdiction.

The Right of Extraterritorial Apprehension

Sanctuary State Sovereignty

The predominant claim by the critics of irregular rendition is that forcible seizures by one state in the territory of another violate the latter's sovereignty unless it has given its consent, explicit or implied, to the action. As a general principle of international law, it is understood that sovereignty involves the supreme, absolute, and uncontrolled power of a nation state to control that which occurs within its territorial boundaries.[8] All persons found within the state's boundaries are subject to the exclusive power of the state. Absent such state's consent, no other state is entitled to exert jurisdiction over matters arising within its territory.[9] Under traditional international law, only the asylum state could exercise in personam jurisdiction regarding the status of the person within that state.[10] The forcible removal of a person without the consent of the asylum state violated this principle of international law.

The sovereign rights of states create corresponding obligations for other states to limit the extension and application of their municipal law beyond national boundaries. In effect, the various principles of extraterritorial jurisdiction recognized in international law and discussed at the outset of this study reflect the mutual obligations of nations to respect one another's sovereignty in the application of municipal law. Most interpretations of the principle of sovereignty provide that under customary international law, states are forbidden to send agents into the territory of another state to capture criminals.[11] Even the right to hot pursuit of criminals is limited by customary law interpretations of state sovereignty so that pursuing police are typically precluded from crossing territorial boundaries of foreign states in the absence of at least implied consent.[12] Many international law authorities also maintain that the principle of sovereignty protects states against violations of their territorial integrity caused by other states "allowing" their nationals to engage in bounty hunting and other private actions intent on apprehending fugitives within the asylum state.[13]

National rights to sovereignty and territorial integrity as historically developed in the customary international law are now incorporated in Article 2, paragraph 4 of the United Nations Charter which provides:

> 4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. [14]

The court in United States v. Toscanino[15] specifically referred to this paragraph as well as a similar provision contained in Article 17 of the Charter of the Organization of American States (OAS)[16] in its determination that the abduction of the defendant from Uruguay constituted a violation by the United States of its treaty obligations. Publicists have frequently cited Article 2(4) of the U.N. Charter and other treaty obligations as well as customary international law guaranteeing state sovereignty as an absolute bar to irregular rendition.

In the much celebrated 1960 seizure of World War II SS Officer and Nazi Adolf Eichmann, the United Nations Security Council specifically addressed an act of state sponsored irregular rendition in terms of the rights afforded under Article 2(4) of the organization's charter. Eichmann had been hiding in Argentina under the name Richard Klementz and was discovered by Israeli agents following a relentless hunt which began almost immediately after the surrender of Nazi Germany.[17] On May 11, 1960, Israeli agents kidnapped Eichmann in Buenos Aires, interrogated him for a period of time, and caused him to sign a statement that he was "voluntarily" leaving Argentina. Without the knowledge or consent of the Argentine

Government, Eichmann was removed to Israel aboard an El Al airliner. Once in Israel, authorities charged Eichmann under an Israeli law which retroactively outlawed Nazi war crimes and acts of collaboration.

Following Prime Minister Ben Gurion's May 23, 1960 announcement that Eichmann had been apprehended, Israel and Argentina engaged in an intensive exchange of diplomatic notes. The Ben Gurion Government apologized for what it admitted was a violation of Argentine sovereignty, but noted "the special significance" of bringing to trial the man responsible for the murder of millions of Jewish people.[18] As the dialogue continued, the Frondizi Government in Buenos Aires insisted that Israel make reparations in the form of the return of Eichmann and the extradition of those responsible for the kidnapping. When Israel refused to make the requested "reparations," the Argentines requested an "urgent meeting" of the U.N. Security Council to consider "the violation of the sovereign rights of the Argentine Republic resulting from the illicit and clandestine transfer of Adolf Eichmann from Argentine territory to the territory of the State of Israel."[19]

During the course of the Security Council debate, Argentina argued that all states had an interest in condemning the Israeli action "because of the dangers which this act and its possible repetition engender for the maintenance of peace and international security."[20] The Argentines raised the possibility that the Eichmann seizure, if not condemned by the Security Council, might be used as a precedent to justify future "violations of the sovereignty of other states."[21] Mrs. Golda Meir answered for Israel, arguing that the true threat to international peace and security lay, not in Eichmann's seizure, but in allowing Eichmann the war criminal to remain at large. Articulating the Israeli case, Mrs. Meir asked rhetorically of the Council, "Is this a threat to peace -- Eichmann brought to trial by the very people to whose total physical annihilation he dedicated all his energies..?"[22]

After considerable diplomatic effort by several of the permanent members of the Council to reach a consensus, a resolution was adopted declaring that Eichmann's seizure had violated Argentine sovereignty and was incompatible with the United Nations Charter. With the Soviet Union and Poland abstaining, the Council requested the "Government of Israel to make appropriate reparation" in accordance with the U.N. Charter and rules of international law.[23] Following the adoption of the Security Council resolution, Argentina and Israel negotiated a compromise under which the two governments agreed to an exchange of new ambassadors. The governments issued a joint communique in which they announced their decision "to regard as closed the incident that arose out of the action taken by Israeli nationals which infringed upon fundamental rights of the State of Argentina."[24]

The Israeli seizure of Eichmann is a case bearing many similarities to the proposed countererrorism measure of extraterritorial apprehension. Eichmann was forcibly seized by state agents and without the consent or acquiescence of the asylum state. It is less certain whether Eichmann represented a genuine threat to international peace and security or to the Israeli state. In all probability, Eichmann's seizure and trial were more acts of retribution for his outrages against the Jewish people and less acts in the interest of crime prevention or deterrence. Noting the Security Council condemnation of the Israeli action as a violation of

Argentine sovereignty and as incompatible with the U.N. Charter, it may seem there is little possibility that extraterritorial apprehension would be viewed otherwise.

While the Security Council action in the Eichmann case represents an authoritative interpretation of Article 2(4) of the Charter, it is not in and of itself international law. Even more important, the Security Council debate did not in any significant way address the existence of possible exceptions to the sovereign rights and protections recognized under Article 2(4). Although Mrs. Meir implied Eichmann could be viewed as a general threat to world peace, there was no specific demonstration that he posed a continuing, imminent and serious threat to international peace and security or, alternatively, to the national security of the state of Israel. Finally, it may be significant that the Security Council resolution, although unanimous, was declaratory in nature and made no attempt to impose sanctions upon Israel. The ultimate facts are that Eichmann was tried by the apprehending state, found guilty under its municipal law, and executed for his universal criminal conduct, notwithstanding any diplomatic apologies or U.N. Security Council resolution.

One other aspect of the Eichmann case must be carefully weighed when considering its impact on the permissibility of extraterritorial apprehension. At the root of a violation of state sovereignty brought about by irregular rendition is the deep embarrassment caused to the asylum state. The seizure constitutes an exposure of the asylum state's inability to maintain credible control of actions occurring within its borders. In the Eichmann case as well as in the case of the vast majority of irregular renditions, the state performing the seizure has no desire or intent to embarrass the asylum state. In most instances, the state benefitting from seizure would prefer to distance itself from the act of apprehension and to deny any state support for it. In the Eichmann case, the official Israeli position was that the abduction was not state supported. Israeli relations with the Argentines had been cordial. In fact, the two governments were in the process of entering into a bilateral extradition treaty when the seizure occurred.

The circumstances which will tend to surround the application of extraterrritorial apprehension are quite different. As a counterterrorism measure, it is designed and intended to embarrass the sanctuary state or stateless area. One of the desired outcomes of such an apprehension would be to undermine the credibility of the regime through the limited and temporary violation of its territorial integrity. Rather than denying the action was state supported, the apprehending state would publicly acknowledge the seizure and explain the reasons for it.

Rights of Other States and the Minimum World Public Order System

Many of the analyses of irregular rendition under international law have tended to focus on the rights and interests of the sanctuary state or even the individual subjected to the seizure. As noted, the interest of the sanctuary state in the maintenance of its sovereignty and territorial integrity is of such gravity that extraordinary protection is provided under international law. It is to be expected that international law is extremely protective of the nation state unit which continues to form the basic component in the minimum world public order system.

While sovereign state rights to territorial integrity and political independence are important, international law encompasses other vital interests in the minimum world public order system. Unfortunately, many analyses of irregular rendition have tended to ignore these other interests, instead, excluding them from the formation of applicable international law. Viable and enforcible international law is not founded upon the interests or rights of any single state, group of states, or isolated juridically recognized entity. Instead it is based upon a comprehensive analysis and balance of the interests and rights of all participants in the minimum world public order system.

A reliable international law analysis of extraterritorial apprehension must consider the interests and rights of other key participants: the apprehending state, other states affected by the terrorists to be seized, and the minimum world public order system as a whole. At issue is whether there are interests protected by the conventional or customary international law so substantial that, on balance, the right of the sovereign state to territorial integrity and political independence may be forced to yield. The case law interpreting the Ker-Frisbie doctrine has not as yet produced a careful analysis of interests beyond those of the sanctuary state or "abducted defendant." Accordingly, it is necessary to look beyond these decisions to identify these other key interests and any law which may serve to protect them.

While the sanctuary states are entitled to the protection of Article 2(4) of the U.N. Charter, such protection is also available to the apprehending state and other members of the world community of nations. In the case of international terrorists who may be supported by the sanctuary state, their attacks perpetrated on the nationals and institutions, public or private, of other members of the international community are clearly in contravention of their obligation to "refrain...from the threat or use of force against the territorial integrity or political independence of any state, in any other manner inconsistent with the Purposes of the United Nations."[25] Moreover, the "Purposes of the United Nations" as articulated in Article 1 of the Charter[26] are certainly not consistent with the state sponsorship of, or even acquiescence in, international terrorism directed at other members of the world community from within a state's borders.

Sanctuary State Responsibility for Terrorism Emanating From Within Its Territory

Categories of State Liability

Sovereign states are held responsible or liable to other states for their actions or omissions which violate the legitimate rights of other states in the minimum world public order system. The principle of external responsibility derived from the fundamental concepts of the rights and obligations of sovereign states, provides that one state's violation of another's external political or territorial sovereignty is a delinquency which imposes liability on the offending state.[27] This same principle extends to state agents as well as nationals of a state acting independent of any state direction.

Under international law, the sovereign state bears direct liability for acts of organs of its government. The United States Government clearly hoped to mount sufficient evidence against the Khadafy regime in Libya to establish a credible case based on this theory of direct liability in undertaking the April 14, 1986 military air strikes against the terrorist infrastructure in Tripoli and Benghazi.[28] In support of its actions, U.S. Government spokesmen repeatedly claimed they had "incontrovertible proof" that the Libyan Government had been directly implicated in the April 5, 1986 bombing of the La Belle Club in West Berlin which resulted in the deaths of a U.S. serviceman and a Turkish woman and the injuring of some 230 other persons.[29]

Alternatively, a sovereign state may be held to be vicariously liable where it knowingly allows private persons to perpetrate activities from within its territory which injure other states. The theory of vicarious liability under international law provides that a state has a recognized duty to exercise reasonable care to prevent "illegal acts" which may originate in its territory. In the event such acts occur, the sanctuary state has a responsibility to the injured state to either punish the wrongdoers or to compel them to make reparation.[30]

The principle of vicarious liability was made applicable to states sponsoring or acquiescing in terrorist activity within their borders through the 1970 Declaration of Principles of International Law adopted by the U.N. General Assembly.[31] Among its other provisions, the Declaration prohibits state acquiescence to activity within its territory that aims at fomenting civil war or committing terrorists acts in another state. The Declaration may not as yet constitute a firm codification of customary international law. However, it does represent an authoritative interpretation of the obligations undertaken by soverign states under the U.N. Charter as understood by a sizable majority of the General Assembly.

Theories of Vicarious State Liability

Under international law, vicarious liability may be imputed to the state for its failure to control terrorists operating within its territory under one of three theories: fault liability, acts on behalf of a state, or absolute liability.[32] Under the theory of fault liability, a sanctuary state incurs responsibility for hostile acts emanating from its territory unless it was unaware of such activity, or knew but was unable to prevent it.[33] The fault liability theory is the most widely recognized of the three theories of liability by the international community. The International Court of Justice appeared to invoke the fault theory in its adjudication of the historic 1949 Corfu Cannel case in which it noted that a state is liable if it knowingly permits its territory "to be used for acts contrary to the rights of other States."[34] While this theory allows an injured party to hold states liable when they are aware of the terrorist activity within their borders, it does not serve as a basis for establishing state responsibility in cases where the state is unaware of such activity. Nor can it be used to established liability in the stateless "gray areas" where there may be awareness of the terrorist activity, but no responsible and capable sovereign authority in existence to take remedial action.

A state may also be held vicariously liable under international law for the conduct of persons who act on its behalf. Under this theory, if a state accepts the benefits derived from the actions of an individual or group, it is deemed to have consented to and ratified the actions.[35] In the case of international terrorism, unless it can be firmly established that the acts are committed at the direction of, or in direct support of a state, e.g., the West Berlin La Belle disco bombing, it may be difficult to evidence a sanctuary state's acceptance or ratification of the "benefits" of the terrorists' acts.

The third basis for imputing liability to states holds them strictly accountable for terrorist acts which originate from within their territory.[36] Under this theory, a state is strictly liable if it tolerates the use of its territory for staging an intervention into a foreign territory. Sanctuary states and stateless areas remain accountable for all acts of terrorism staged from within their borders regardless of whether or not they were aware of such acts or were able to prevent them.[37]

Of the three theories of vicarious liability applicable to states, strict liability is clearly the broadest. It would even provide a basis for imputing liability in stateless areas to the extent there is any vestige of a sovereign regime in existence. However, since an imprudent application of the absolute liability theory may work even as against a nonaccomplice or "innocent" state, the principle has not received wide acceptance in the international community. For this reason, it would have to be applied selectively, if at all, as a basis for justifying pro-active counterterrorism measures against a sanctuary state which sponsors or condones a terrorist presence within its borders.

International law recognizes that sovereign states are entitled to substantial protection against the infringement of their rights to political independence and territorial integrity as recognized in Article 2(4) of the U.N. Charter. However, international law also recognizes that implicit in the universal respect for such rights is the corresponding obligation of states to refrain from interfering with the political independence and territorial integrity of other states. The contemporary world public order system is substantially one in which nation states form the paramount authority over politically designated geographic areas. These states are charged under the principle of state responsibility and its supporting liability doctrine with maintaining control over activities within their borders which could interfere with the sovereignty of other states. A state's intentional or negligent failure to meet its obligations undermines its own sovereign status under international law and gives rise to self-help remedies by other states which have been injured as a result.

Remedies Under International Law

The Doctrine of Self-Defense

Both customary and conventional international law have long recognized that even the rights to political independence and territorial integrity inherent in the fundamental principle of national sovereignty must yield in the interest of maintaining international peace and security. A right to individual national, or more recently, collective, self-defense arises in a state or states faced with the imminent threat of armed attack.

The violent acts of international terrorists tend to be directed against targeted state institutions, public or private, and the nationals of such states. When individuals become the targets of terrorist attacks, those individuals are placed in that position because of their relationship with the actual target of the terrorist, an identified state or political system. In other words, terrorist acts may be perpetated against an immediate and often very innocent victim with the real intent of causing some response from, or injury to, the actual target, a sovereign state or political system. When such violent acts emanate from a sanctuary state and liability for them can be imputed to that state, an act of aggression has been committed. The state or states which the terrorists sought to influence by their actions acquire under international law a right to engage in self-help against the responsible sanctuary state aggressor. In the case of a stateless area, the very existence of sovereign rights themselves may be in question. However, to the extent such rights do exist and have any application to an area, the same principle applies.

A right of individual or collective self-defense arises authorizing the victims of the aggression to respond with necessary and proportional measures to preclude an imminent attack or to stop an attack which is already underway. It is this fundamental right of the nation state and groups of nations to engage in self-help, usually as a matter of last resort when other remedies prove ineffective or unavailable, which provides the basis for lawful intervention into the sanctuary state or stateless area implicit in the right of extraterritorial apprehension.

Customary International Law of Self-Defense

The customary international law right of self-defense not only authorizes a state to respond to an actual attack, but also to engage in preemptive actions in anticipation of an imminent attack.[38] A state may undertake such preemptive action, referred to as "anticipatory self-defense," whether the aggression directed against it is conventional or unconventional in nature.[39] International law authorizes the use of force in individual national self-defense where a state reasonably apprehends that it will be the object of an attack by some external force or entity.

Customary international law recognizes four prerequisites to exercising the right of self-defense: (1) the existence of an imminent threat; (2) a compelling necessity to act in response to an imminent or ongoing threat; (3) the exhaustion of all practical peaceful procedures to avoid the use of force; and (4) that the force employed to counter the threat is proportionate to the threat and does not exceed that which is necessary to repel the aggression.

The principal international law authority cited for the doctrine of self-defense and, in particular, the right to anticipatory self-defense, is the celebrated *Caroline* case.[40] When viewed in a contemporary counterterrorism context, the circumstances in the *Caroline* case seem particularly timely and relevant. In that case the steamer *Caroline* was employed in 1837 to transport personnel and equipment from U.S. territory across the Niagara River to Canadian rebels on "Navy Island" and from there to the mainland of Canada. The U.S. Government had not prevented this assistance to the Canadian rebels who were presumably engaged in various dissident and violent acts directed against the British administration in Canada.

In the contemporary context, it would not be difficult to understand how British authorities might come to view the crew of the *Caroline* as engaging in "terrorist activity" with the acquiescence, if not support, of the United States. Not only was the United States the flag state for the *Caroline*, but it was also providing sanctuary for the crew and a source of supply for the rebels. There is no indication that the Canadian rebels were engaged in the sort of violence which typifies contemporary terrorism and to this extent there is no exact analogy to current events.

Neveretheless, the case dealt with the issue of state responsibility for the private acts of those under its control in an instance when those acts were directed against another state.

Canadian Government troops crossed the Niagara River and entered the territory of the Unites States. After killing two U.S. nationals, the troops set the Caroline adrift which resulted in its wreck on the Falls. In the ensuing diplomatic exchange, Great Britain maintained it acted as a matter of justifiable self-defense. The United States did not deny that circumstances might exist which would authorize force in self-defense. However, the United States denied the facts in this situation justified the resort to force. The diplomatic exchange terminated with the British issuing an apology but without any assumption of legal responsibility for the death of the two U.S. nationals. The absence of any reclama from the United States Government is broadly interpreted as its tacit acceptance of the permissibility of the British action in self-defense.[41]

Examined in the contemporary counterterrorism context, the British undertook action against private interests freely operating from the United States as sanctuary state. British action violated U.S. territorial integrity to the extent the Canadian forces entered the state of New York, actively engaged U.S. nationals, and destroyed a U.S. flag vessel. The British action was directed against the privately owned and crewed Caroline and not the United States Government. However, the United States Government had done nothing to restrain the Caroline crew from actions which derogated the British rights to the territorial integrity and political independence of its Canadian colony. International law provided that under these circumstances, the United States had compromised its right to sovereignty which temporarily yielded to the British right of self-help in the form of individual self-defense.

Self-Defense Under the United Nations Charter

The concept that national sovereignty is not absolute in international law and is qualified by an individual, and more recently, a collective, right if self-defense is specifically recognized in the U.N. Charter. Article 51 of the Charter provides inter alia:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. 42

The doctrine of self-defense as recognized in Article 51 qualifies the sovereign rights of nation states guaranteed in Article 2 of the Charter. Article 51 authorizes a nation or group of nations to use force against an aggressor state or states in accordance with the customary international law of self-defense. Implicit in Article 51 is that the use of force in individual or collective self-defense may well impact on the aggressor nation's territorial integrity or political independence.

Unfortunately, Article 51 does not eliminate all the ambiguities which surround the exercise of individual or collective self-defense. It is not clear from this provision whether anticipatory measures are authorized or what may constitute an "armed attack" justifying a response. A number of publicists and, at times, the Security Council itself, have preferred a restrictive reading of Article 51. Advocates of the restrictive view, argue that Article 51 is clear and unambiguous on its face and that it does not apply to any form of aggression other than an "armed attack."[43] One such proponent, Professor Kunz, has argued:

> ...this term means something that has taken place. Art. 51 prohibits "preventive war." The "threat of aggression" does not justify self-defense under Art. 51. Now in municipal law self-defense is justified against an actual danger, but it is sufficient that the danger is imminent. The "imminent" armed attack does not suffice under Art. 51.[44]

Advocates of the restrictive view also argue that a single isolated incident may not be sufficient to justify a self-defense response and that it is necessary to look to the totality of a series of armed attacks to confirm that a systematic campaign of aggression exists.[45] Under this restrictive view, sanctuary states engaged in the support of terrorist activities may be able to argue that selective acts originating from their borders do not constitute "armed attacks" within the meaning of Article 51. These sanctuary states may maintain that they have not committed the requisite "armed attack" against other states justifying a defensive response against them.

The advocates of a restrictive interpretation of the right of self-defense might have a persuasive argument but for the repeated failure of the United Nations as an organization to maintain international peace and security through the institutional mechanisms provided for in the Charter. With few exceptions, the Security Council as the organ responsible for maintaining peace and security has failed to meet its institutional responsibilities. During the course of Security Council meetings designed to address cases of rising tension or even open warfare betwee U.N. members, more often than not, the body is paralyzed by political disagreement among the five permanent members. If these permanent members fail to reach a consensus, the Council is unable to order sanctions or other peacekeeping measures against the aggressor state.

The more persuasive interpretation of self-defense under Article 51 and the one which is supported by contemporary custom and usage, retains the concept of reasonable anticipatory measures and permits action without meeting specific institutional preconditions of the United Nations itself. International law authorities, McDougal, Feliciano, and Mallison, in examining the preparatory work or legislative history of the United Nations Charter, the "travaux preparatoires," indicate that the general purposes and demands projected by the parties drafting the agreement strongly favor a broad interpretation of Article 51.[46] As Professor Mallison notes:

> The formulation of Article 51 cannot be rationally construed as both preserving the "inherent" right of self-defense and simultaneously eliminating those central elements of it involving anticipatory self-defense. Since the basic community policy in maintaining at least minimum world public order is made possible by including reasonable anticipatory defense within the "inherent" right, this seems the better interpretation on policy grounds as well as consistency with the preparatory work.[47]

Consistent with this analysis, it is axiomatic in international law that treaties and other international agreements only limit the rights of parties to the extent that the parties have explicitly agreed. Since the United Nations Charter no where expressly prohibits anticipatory self-defense but instead provides in Article 51 that it shall not impair the inherent right of self-defense, a broad interpretation of the language is by far, the more persuasive.

Under this broad interpretation of Article 51, a state is fully entitled to undertake counterterrorism measures against a state which bears responsibility for the acts of terrorism staged within or from its borders. The state subject to the armed terrorist attacks is not obligated to first seek peaceful resolution if it reasonably apprehends that preemptive measures are necessary.[48] However, consistent with the customary law of self-defense, if alternative means are reasonably available to address the threat and circumstances permit pursuing such means, the threatened state is required to invoke the less coercive measures. Whether or not preemptive measures are authorized is a question of necessity, the imminent nature of the threat, and the means available and required to address it.

Self-Defense as a Basis for Intervention

In the actual application of extraterritorial apprehension, prosecutors would first obtain a sealed indictment from a federal grand jury, or, alternatively, a warrant of arrest from a U.S. magistrate. Prosecutors would introduce sufficient evidence to establish probable cause that a crime had been committed and that the identified defendant terrorist or terrorists had committed the crime. Having met these threshold requirements, actual in personam jurisdiction over the indicted terrorist would have to be achieved through some lawful means of intervening in the stateless area or sanctuary state.

As noted, the sanctuary state would have to be shown to be directly or vicariously liable for the past actions of the terrorist or the terrorist's organization. In the case of a stateless area, where the existence of sovereign rights may be in question, the entire issue of establishing a right to intervene may be less important. Having established the direct or vicarious liability for terrorist activities of the sanctuary state, and possibly that of whatever regime may purport to be the constituted legal government for the stateless area, the right of self-defense may be exercised as against the sanctuary state or stateless area itself. The threatening terrorist activities within the sanctuary state or stateless area give rise to the right of self-help and right to intervene through the exercise of self-defense under international law.

Extraterritorial apprehension founded upon a right of individual or collective self-defense should satisfy the four customary international law requirements for application of the doctrine. Evidence of past terrorist conduct and present capability to strike will normally satisfy the first two requirements to demonstrate that the apprehending state has a compelling need to act and in response to an imminent or ongoing threat. However, an apprehending state may not be able to satisfy these requirements if the indicted terrorist has clearly ceased his or her activities for a sustained period of time or redirected actions against other states.

In fulfilling the third customary law requirement that the endangered state exhaust all practical peaceful procedures, the apprehending state will have to be able to demonstrate that extradition or other less formal means of rendition are either unavailable or useless under the circumstances. Actively meeting this requirement will serve as a useful check against misapplication of extraterritorial apprehension to states which are actively cooperating in either bilateral or multilateral extradition treaties or conventions.

The fourth and all important requirement of self-defense is that the endangered state demonstrate that its response is proportional to the threat. Just as legal scholars have debated the scope of Article 51 with regard to anticipatory self-defense, they disagree over whether proportionality should be based upon only the immediate threat facing the endangered state or, alternatively, whether such state may consider an "aggregation" of past illegal acts or events.[49] As noted by Gregory F. Intoccia in his evaluation of U.S. counterterrorism strategy, "...disagreement exists over whether the legality of a response is to be determined by reference to the prior illegal act which brought it about, or whether the legality of the response is to be determined by reference to the whole context of the relationship between involved parties."[50] Intoccia notes that the Security Council has formally condemned as an illegal reprisal any attempt to justify the totality of violence based upon an "accumulation of events."[51]

Experience and recent statements by senior U.S. Government officials indicates that individual self-defense as recognized in Article 51 of the Charter will generally serve as the basis for U.S. counterterrorism measures involving the use of force.[52] The requirement that such force meets the criterion of proportionality is particularly important if the United States is to avoid strident criticism from the international community. What makes extraterritorial apprehension a particularly attractive option when compared with other pro-active measures, is the relative ease with which the proportionality criterion is met.

Extraterritorial apprehension generally need not turn on an "aggregation" of past illegal acts or events. Instead, it will often result from and be based upon one or more specific acts of terrorism. These acts will form the basis for the indictment or warrant of arrest. Whether preemptive self-defense is justified will of course be related to the continuing proclivities and capabilities of the terrorist or terrorist elite element to be apprehended.

Recent United States pro-active counterterrorism measures have been based upon the right of self-defense. In his April 14, 1986 address to the nation announcing "...air and naval forces of the United States launched a series of strikes against the headquarters, terrorist facilities and military assets that support Moammar Khadafy's subversive activities...",[53] President Reagan explicitly cited the right of self-defense in justifying U.S. actions. Said the President:

> When our citizens are abused or attacked anywhere in the world on the direct orders of a hostile regime, we will respond so long as I'm in this Oval Office. Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight, a mission fully consistent with Article 51 of the United Nations Charter. We believe that this preemptive action against his terrorist installations will not only diminish Col. Khadafy's capacity to export terror, it will provide him incentives and reasons to alter his criminal behavior. 54

In the aftermath of the air strikes, the Khadafy regime and its supporters charged that the U.S. military action was indiscriminate, resulted in unnecessary loss of civilian lives and property, and was itself an "act of state terrorism." The U.S. case in support of its action was generally considered persuasive by Western allied leaders who were made privy to classified intelligence reports linking the Khadafy regime to the La Belle Club bombing as well as planned future attacks. Nevertheless, following the relatively precise air strikes in Libya, adversaries of the United States argued that various preconditions for the exercise of the right of self-defense had not been met and that therefore the action violated international law.

Extraterritorial apprehension would certainly have far more focused objectives than direct military strikes of the type conducted in April of 1986. Its application would invariably be more selective. Presumably, there would be little debate as to whether the apprehension was proportional to the threat, assuming the use of minimum military force in conjunction with the apprehension. The self-defense doctrinal requirement of proportionality would permit the use of sufficient force in conjunction with the apprehension to suppress terrorist and sanctuary state or stateless area forces which interfere with the operation.

Depending upon the location of the targeted terrorist leadership or operational elite and prevailing circumstances in the sanctuary state or stateless area, occasions may arise which require overt military action to suppress such resistance using naval, air, or ground forces. However, in the majority of cases, the initial phases of the extraordinary apprehension will be best achieved by the covert insertion by specially trained forces which conduct the seizure without the knowledge of either the sanctuary state or local terrorist elements. In any case, a well planned extraterritorial apprehension mission should be able to easily meet the proportionality requirement of the customary international law of self-defense. Moreover, although not a part of the proportionality requirement of self-defense, extraterritorial apprehension is far more likely than other pro-active coercive measures to be selective, minimizing collateral injury and damages sustained by innocent persons.

Application of the International Law of Human Rights

Expanding International Law of Human Rights

United States v. Reed[55] touched on the issue of human rights with the defendant arguing that his "abduction" by CIA agents breached the United

States commitment to this expanding body of international law. The court deflected the argument by noting it saw no repeated pattern of abuse by the Government. The Reed decision leaves open the issue of whether irregular renditions of any sort might be impermissible under this branch of international law and, by its incorporation into U.S. municipal law, a basis for divestiture of criminal court jurisdiction.

A number of commentators have argued that notwithstanding the Ker-Frisbie doctrine's perspective that Constitutional due process is not violated by such seizures and that only states have standing to complain of violations of their sovereignty, the defendant's fundamental human rights as now recognized by international law are violated. Since international law is incorporated into the U.S. municipal law, these commentators maintain any violation of the apprehended defendant's human rights resulting from irregular rendition is an absolute grounds for a U.S. municipal court divesting itself of jurisdiction.[56]

The expanding international law of human rights has received the full public support of the U.S. Government and its principal Western allies. Although this body of law has historical antecedents predating the nineteenth century, its nucleus emerged with the adoption of the United Nations Charter in 1945[57] and the Universal Declaration of Human Rights adopted in 1948.[58] The Charter declares that one of its purposes is to promote and encourage respect for human rights and the funndamental freedoms for all.[59] Article 55(c) states that "[t]he United Nations shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Article 56 mandates "all Members [to] pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."[60]

Over more than 40 years these provisions have been enshrined, reinforced, and expanded upon in a variety of international human rights conventions, (e.g., the International Covenant on Civil and Political Rights[61] and the American Declaration on the Rights and Duties of Man[62]), as well as General Assembly resolutions. These conventions and resolutions have increasingly given juridical content to the Charter and the 1948 Declaration commitment to the more fundamental of these rights.[63] The International Court of Justice expressly established the existence of human rights as universally recognized legal obligations in its 1971 Advisory Opinion on Namibia (Southwest Africa).[64] Judge Fuad Ammoun of the International Court of Justice in his separate opinion on the case observed that:

> [a]lthough the affirmations of the Declaration (Universal Declaration of Human Rights) are not binding *qua* international convention...they can bind States on the basis of custom..., whether because they constituted a codification of customary law..., or because they have acquired the force of custom through a general practice accepted as law....[65]

Under President Carter's Administration, international human rights became a centerpiece of U.S. foreign policy.[66] One of many Congressional declarations in support of this increasingly more important element in U.S. foreign policy was adopted in Section 502B as a 1976 amendment to the Foreign Assistance Act of 1961 and provides *inter alia*:

> (a) (1) It is the policy of the United States, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, to promote and encourage increased respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. To this end, a principal goal of the foreign policy of the United

> States is to promote the increased observance of internationally recognized human rights by all countries.[67]

While the Reagan Administration redirected the focus of U.S. foreign policy to the problem of international terrorism, it did so without disavowing the U.S. commitment to human rights. In fact, many early Reagan Administration statements concerning the redirected focus of U.S. foreign policy in the 1980s addressed international terrorism as fundamentally inconsistent with the expanding commitment to universally recognized human rights.

Application of Human Rights to Extraterritorial Apprehension

Unlike the more traditional international law, the new international law of human rights creates enforceable rights in the individual and not the sovereign. Whether these rights are derived from customary international law or through multilateral convention, advocates argue with increasing authority that the rights apply to all persons, irrespective of their nationality.[68] Under the developing doctrine, the state can no longer waive fundamental human rights without in most instances disregarding its international obligations. Some states have been slow to sign or ratify the conventions. Other states may refuse the concept of human rights altogether as provided for in the conventions and even refuse to acknowledge the existence of a growing customary international law of human rights as essentially codified in the U.N. Charter and 1948 Declaration of Human Rights. Nevertheless, the relatively aggressive United States affirmation of human rights in its legislation and through its executive branch declarations over the past ten years virtually precludes it from seriously denying their application within U.S. municipal law.

Publicists maintaining that the new human rights doctrine is a challenge to irregular rendition note that Ker and a number of subsequent decisions denied the defendant the right to raise violations of sovereign treaty obligations. As noted in the Chapter II analysis of municipal law, several of the Ker-Frisbie line of decisions reasoned that only states may object to apparent violations of their sovereignty brought about by unauthorized foreign state seizures within their borders. In the absence of a protest from the asylum state, the courts have been prepared to assume acquiescence or implied consent to the seizure. But today, under the new international law of human rights, this line of reasoning may no longer be available to the well informed court.[69]

U.S. courts considering cases of extraterritorial apprehension will be asked whether the government action comports with human rights guarantees under both the U.S. Constitution and international law. Judicial review of the international human rights issue in irregular rendition cases is probably overdue. However, just as it will be absolutely necessary for courts hearing a terrorist prosecution case brought by extraterritorial apprehension to balance the rights of all interested state participants in interpreting the international law as it applies to sovereign rights and issues of self-help, so also will it be crucial to balance the human rights of all interested persons. The application of international human rights to the issue of extraterritorial apprehension will result in an excessively narrow and erroneous interpretation of international law if it examines the rights of only the international terrorist defendant without also considering the rights of the nations, institutions, and, in particular, the persons victimized by the acts of terror.

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The apprehended international terrorist will see it in his or her interest to assert various human rights which appear to have received essentially universal recognition under international law. Using the Universal Declaration of Human Rights[70] as persuasive authority for, if not an actual codification of, customary international law, the apprehended terrorist may allege the seizure constitutes a violation of several provisions. The terrorist may assert that the seizure violates Article 3 which provides "Everyone has the right to life, liberty and the security of person."[71] There may be a claim that the irregular rendition violates the Article 9 guarantee -- "No one shall be subjected to arbitrary arrest, detention or exile."[72] He or she might maintain a derogation of rights under Article 12 which states:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.[73]

In taking note of the availability of these rights for the benefit of apprehended terrorists, it is important to understand that by definition, human rights have a "universal" application. They are not limited to any one class or category of individual. Whether based upon the Universal Declaration of Human Rights as a codification or authoritative statement of customary international law or some specific multilateral convention, these rights apply to all persons, regardless of nationality and status. Moreover, in applying these rights, it must be understood that they do not exist in the absence of corresponding obligations imposed on states and other persons. The rights and obligations of the state and the persons within society must be balanced through judicial and administrative processes. Human rights cannot exist in a lawless, violence ridden environment of the type promoted by international terrorism.

As important as the doctrine of human rights may be to the political-legal system and society as a whole, it provides particularly important guarantees to the direct victims of terrorist violence. Article 3 of the Universal Declaration of Human Rights specifically states "[e]veryone has the right to life, liberty and the security of person."[74] (emphasis added) Article 8 of the Declaration provides "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[75] (emphasis added) Article 5 further provides "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[76] Any professionally competent and reasonable court of law addressing issues of fundamental human rights during the prosecution of an apprehended terrorist would be constrained to balance the defendant's rights against those of the community at large and the individual victims in particular.

Extraterritorial apprehension initiated by a probable cause finding by either a U.S. grand jury or federal magistrate and justified upon reliable facts as an appropriate self-help measure of self-defense is not *ipso facto* "illegal" or "arbitrary." Conducted pursuant to reasonable guidelines with the objective of providing the terrorist defendant a fair trial before a court of competent jurisdiction, extraterritorial apprehension may do much to serve the international community's interest in the advancement of human rights. A counterterrorism measure of this type affirmatively addresses the continuing derogation of human rights perpetrated by the terrorists on their innocent victims. Moreover, it does so at less human cost than might otherwise result from the application of more coercive pro-active enforcement measures.

CHAPTER IV

CONSIDERATIONS PRIOR TO APPREHENSION

> We will act to indict, apprehend and prosecute those who commit the kind of atrocities the world has witnessed in recent weeks. 1
>
> President Ronald Reagan
> July 1985

The decision as to whether or not to adopt extraterritorial apprehension as a counterterrorism measure will also depend on an understanding of a number of key issues arising both before and after the actual apprehension occurs. In this and the following chapter, a set of political, operational, and ancillary legal issues will be examined for their possible impact on this counterterrorism measure and its implementation. This chapter examines those issues which would have their principal impact prior to the actual apprehension of the terrorist. Accordingly, these are considerations that would have to be taken into account early in the process of deciding whether to adopt such a counterterrorism measure. If the measure is to be adopted, these considerations would also have to be weighed closely throughout the planning process.

Case Formulation

Should the President adopt extraterritorial apprehension as a pro-active counterterrorism measure, it will be absolutely essential that planning and development proceed on a broad inter-agency basis. Whereas counterterrorism strategies and measures developed to date may have involved more than one department or agency of the U.S. Government, few have encompassed the range of functions, expertise, and support that will be required to successfully achieve a program of aggressive criminal prosecution through the exercise of the right of extraterritorial apprehension.

Early planning and implementation of extraterritorial apprehension will require the cooperative efforts of the Department of Justice and various agencies within the U.S. intelligence community. While the Department of Justice has criminal and counter-intelligence collection capabilities in direct support of its normal law enforcement mission, information on international terrorist elites is more apt to originate from sources and methods not under the direction of the Department and the Federal Bureau of Investigation. Criminal prosecutors working directly for the Department of Justice or the various U.S. Attorneys Offices throughout the country are charged with the immediate responsibility of applying available intelligence and investigatory evidence to construct criminal cases against terrorists suspected of having violated federal criminal law.[2]

The Department of Justice has had considerable experience in prosecuting cases of so-called "domestic terrorism" occurring within the United States. With the adoption of the 1984 Comprehensive Crime Control Act[3] and the increased interest in applying other federal criminal law with extraterritorial reach to terrorists located beyond U.S. borders, the Department of Justice has begun to aggressively use its law enforcement capability against international terrorism. A number of the Department's U.S. Attorneys are now engaged in a concerted effort to reach and prosecute international terrorists located beyond U.S. borders, particularly where the acts of terrorism have been directed against the United States and its nationals. The procedures applied in criminal cases recently developed against international terrorists could well be employed in connection with extraterritorial apprehension. The appropriate U.S. Attorney's Office in conjunction with the Department of Justice reviews available intelligence and investigatory evidence to ascertain whether sufficient admissible, relevant, and credible evidence exists on each and every element of one or more criminal counts. If prosecutors determine that the evidence is sufficient to support a minimally sufficient legal case, i.e., the _prima facie_ case, the U.S. Attorney or his designated assistant seeks a criminal indictment or arrest warrant against the suspect international terrorist.

The Fifth Amendment to the U.S. Constitution provides that "no person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury."[4] The actual exercise of this right is accomplished in the federal criminal justice system by an assistant U. S. attorney presenting evidence regarding one or more crimes to a grand jury of from twelve to twenty-three persons. Grand juries are empaneled, supervised, and instructed by a U.S. district court judge. Grand juries can, and frequently do, operate in secret and may be instructed by the supervising district court to maintain strict confidence regarding all proceedings, witnesses, and actions taken. If twelve or more members find that the evidence presented by the federal prosecutor constitutes probable cause to believe that a crime has been committed and that the named suspect committed the crime, they vote to indict. Alternatively, if the grand jury believes the evidence does not support a single count, they vote a "no true bill."

If the offense to be charged is a misdemeanor, the federal prosecutor may seek to have a U.S. magistrate issue an "information." U.S. magistrates are also authorized to issue "warrants of arrest" for misdemeanors and felonies. In either case, the U.S. magistrate, like the grand jury, is required to find "probable cause" as a basis for his or her actions. Some or all of these procedural actions may be held in confidence by the district court or its magistrates ordering proceedings and documents "sealed" under court order.

These standard preliminary procedures have been applied in various combinations in several efforts to prosecute international terrorists under U.S. federal law. In most, if not all, of these cases, U.S. prosecutors have sought sealed indictments or arrest warrants to avoid alerting terrorist suspects in advance and to preclude release of sensitive information. In response to the October 1985 hijacking of the Italian flag cruise ship Achille Lauro and murder of U.S. national passenger Leon Klinghoffer, the U.S. Attorney for the District of Columbia acted with extraordinary speed to formulate a case sufficient to support a request to Italian authorities for the provisional arrest of alleged mastermind Mohammed Abul Abbas Zaiden (Abul Abbas) and his Palestine Liberation Front (P.L.F.) accomplices.[5]

On Friday, October 11, 1985, an assistant U.S. attorney for the District of Columbia presented a U.S. magistrate with sufficient evidence to establish probable cause that a warrant should be issued for the arrest of Abbas and charging him with a violation of 18 U.S.C. 1203, hostage-taking, as well as piracy and conspiracy to commit both offenses.[6] Unfortunately, the Italian Government took the position that the U.S.

evidence concerning Abul Abbas and a second P.L.F. "representative" was insufficient to support a request for provisional arrest pending their extradition under the International Convention Against the Taking of Hostages.[7]

Most significant about the Achille Lauro case is the manner in which the terrorists were actually apprehended and the extraordinarily effective inter-agency coordination achieved within the U.S. Government in a matter of just hours. Overall coordination and direction of the U.S. reaction was the responsibility of the National Security Council staff. However, individual departments not accustomed to routinely working with one another were suddenly thrust into executing a complex counterterrorism law enforcement action. The Department of Justice and the U.S. Attorney for the District of Columbia formulated at least a preliminary theory of prosecution and marshaled sufficient evidence to make a showing of probable cause to a U.S. magistrate. Political and diplomatic considerations, particularly those involving the Italian Government, were addressed by the Department of State. Necessary intelligence collection and the actions to intercept, divert, and escort the Egypt-Air Boeing 737 with the six P.L.F. terrorists embarked to Sigonella Naval Base in Sicily using U.S. Navy F-14s were clearly the responsibility of the Department of Defense, the Joint Chiefs of Staff, and subordinate operational commanders.[8]

As the opportunity arose to apprehend the hijackers, cognizant officials from each of these principal departments coordinated personally with members of the NSC staff and one another to ensure that all necessary technical experience and expertise were brought to bear on the problem. Although it was Italian authorities who ultimately secured in personam jurisdiction over the four hijackers, the U.S. Government demonstrated an impressive capacity to plan and execute a complex counterterrorism law enforcement operation with little or no prior warning. It is particularly worth noting that notwithstanding the coerced diversion of the Egypt-Air 737 over international waters, the Italian court has shown no inclination to divest itself of jurisdiction due to concerns with "irregular rendition."[9]

The Department of Justice has also sought and obtained arrest warrants for three men believed to have originally hijacked the T.W.A. Flight 847 in June 1985.[10] These hijackers tortured and murdered U.S. Navy Petty Officer Robert Dean Stethem. The hijackers also committed numerous other acts of brutality and theft against the remaining passengers and crew. Other cases reportedly under investigation and development by the Department of Justice relate to the abduction of six Americans missing in Beirut, the infamous Abu Nidal terrorists allegedly responsible for the December 1985 Rome and Vienna airport massacres, and terrorists suspected of perpetrating the bombings in 1983 of the U.S. Embassies in Beirut and Kuwait as well as of the Marine garrison at Beirut International Airport.[11] The details of Department of Justice efforts on these and other cases remain classified. Any indictments or warrants are sealed. But it appears that the process of case formulation, investigation, location of the criminal defendants, and an evaluation of extradition opportunities is well underway. What remains, is to find a means of securing jurisdiction over a named defendant in those instances where extradition is not available.

The Congressional Role

The separation of powers provided for in the U.S. Constitution encourages competition and even conflict among the branches of government. The potential for competition and conflict is often the greatest in "twilight zones" where the Constitution is vague or even silent as to which branch has primary responsibility for a particular function. The problems associated with developing an effective counterterrorism policy and strategy often arise within such twilight zones. What must be remembered in analyzing counterterrorism policy and strategy in general, and perhaps extraterritorial apprehension as a measure in particular, is that substantial interests as well as authority exist in all branches of government. The better the interests, responsibilities, and authority of the branches are understood, the better will be the policy and strategy produced and administered by them.

Congressional interests, responsibilities, and authority as related to counterterrorism are largely a function of the powers provided in section 8, Article 1 of the Constitution. Among the other enumerated powers, the Congress is charged:

> . . . .
>
> 10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.
> 11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.
> 12. To raise and support armies...
> 13. To provide and maintain a navy.
> 14. To make rules for the government and regulation of the land and naval forces.
>
> . . . .
>
> 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers

> vested by this constitution in the Government of the United States, or any department or officer thereof. 12

These and other powers of the Congress provide it an important role in the development, if not planning and execution, of extraterritorial apprehension as a counterterrorism measure. It is the Congress which possesses the power to declare crimes under its clause 10 mandate to define the specified offenses. The enumerated provisions related to the raising and regulation of the U.S. Armed Forces also require a level of Congressional oversight. Its power to declare war and "make rules concerning captures on land and water" may be a curiously relevant, if obtuse, reference to concepts such as extraterritorial apprehension. Powers such as these coupled with the exclusive Congressional powers of authorization and appropriation of revenue make it a key participant in counterterrorism policy and strategy development.

To understand the precise role of the Congress in the immediate case, it is necessary to inquire as to the means the legislative branch has used to regulate and monitor the actions of the executive branch. Strategy planners must ask whether it is necessary to seek Congressional authorization to engage in extraterritorial apprehension. Does a requirement exist to consult with or notify the Congress if military forces are to be used in an extraterritorial apprehension? Even if military forces are not employed, are there other requirements imposing a duty to consult or notify the Congress either before or after the apprehension? If so, with whom and when should the notification or consultation occur? What are the political and operational costs and benefits to various methods of communication or other relationships between the branches? These and other issues must be addressed in developing any counterterrorism strategy option and may be particularly important in the case of extraterritorial apprehension.

The War Powers Resolution

In the event that an extraterritorial apprehension is conducted using U.S. military forces, whether in a direct or major supporting role, the operation may be subject to the War Powers Resolution.[13] The War Powers Resolution (WPR), adopted over the vigorous opposition and veto of President Nixon, became law in 1973 with the expressed purpose "...to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both Congress and the President will apply to the introduction of United States Armed Forces into hostilities..."[14] Key provisions of the WPR which may apply to extraterritorial apprehension are contained in sections 2 through 4 of the Resolution.

Section 2 ("Purpose and Policy") provides that the President can "introduce the Unites States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances:"[15] (1) following a declaration of war; (2) pursuant to specific statutory authorization; or (.) in a national emergency caused by an attack on American territory or armed forces. While this section provides a congressional definition of the limits of executive war powers effectively advising the President of the political risks of ignoring the Resolution, it is probably little more than what Senator Eagleton once described as a "pious pronouncement of nothing."[16]

Section 3 ("Consultation") and section 4 ("Reporting") establish the procedures which the President must follow whenever U.S. Armed Forces engage in "non-routine" activities, ranging from involvement in hostilities to a significant build-up of forces in a foreign country. Section 3 provides that the President "in every possible instance consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.[17] Section 4 requires the President to report to Congress whenever the Armed Forces are introduced into hostilities, introduced into the territory of a foreign nation while equipped for combat, or significantly built up in a foreign nation.[18] Under this provision, the President is to report on the circumstances that require the action, the estimated scope and duration of the action, and his authority for ordering the action, e.g., statute, resolution, the President's inherent authority as Commander-in-Chief under the Constitution, or some other authority.

Legal interpretations of each of these sections vary widely. Proponents of limiting the President's war-making powers argue that the Executive may only introduce U.S. Armed Forces pursuant to Congressional action or a "national emergency" narrowly defined as a direct attack upon the United States, its territ[illegible]ssions or armed forces. These proponents further tend to emphasize the President's obligation to consult in every possible instance before the introduction of U.S. Armed Forces.

Advocates of broad executive power in foreign and military affairs maintain that the President retains substantial Constitutional authority as Commander-in-Chief. These advocates disagree with the proponents of limited executive power on the issue of the constitutionality of the

Resolution and precisely what sorts of military actions should give rise to its being invoked. There is also disagreement over what constitutes "consultation"--merely informing or something more akin to seeking consent. Still further controversy arises over the issue of when, in the military planning and execution process, consultation should occur. Moreover, since the Resolution is silent on the details of the consultation, no one is certain as to precisely who in the Congress is to be consulted.

At first glance, sections 2 through 4 might appear to have automatic application to any introduction of U.S. Armed Forces into situations where imminent involvement in hostilities is indicated. This might often be the case if military forces were to be used in conducting an extraterritorial apprehension in a sanctuary state or even a stateless area like Lebanon where heavily armed militias are present. However, proponents of broad executive discretion argue that the phrase in section 3, "in every possible instance." (emphasis added) implies that there may be instances in which it is not possible to consult before ordering the introduction of forces.[19]

Section 4 requiring the President to report whenever he introduces U.S. forces "into hostilities" or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; into the territory, airspace or waters of a foreign nation, while equipped for combat..." was not drafted with counterterrorism operations in mind. The legislative history of this and other provisions of the WPR indicate the Resolution was intended to address the problem of conventional or even substantial nonconventional intervention which has characterized the post World War II and Vietnam experiences. The concept of a precise use of military forces to facilitate a counterterrorism law enforcement objective was not contemplated by Congress when it adopted the WPR.

Since the legislative history does not contemplate pro-active counterterrorist actions, a strong argument exists that the WPR has little, if any, application in instances where military forces may be used to conduct or support an extraterritorial apprehension of international terrorists. It may be argued that the major objective of extraterritorial apprehension would be to avoid broader scale hostilities between the United States and the sanctuary state which could result if the targeted leadership or operational elites of the terrorist organizations were not apprehended. In other words, such preemptive action by the Executive would actually work toward the reduction of tensions and serve to reduce the possibility of having to introduce U.S. Armed Forces in a conventional or major unconventional warfare role. As for the requirement that the President consult before forces are introduced, the Executive could maintain, as has occurred in other military operations, that the constraints of time and secrecy coupled with difficulties in arranging extensive consultations with enough key members of Congress, militates against anything but the most limited dialogue.[20]

In practice, the Resolution has been invoked and applied in a number of different manners depending upon the circumstances and prevailing attitude within the particular Administration toward the Congress. President Ford reported that he had ordered U.S. military forces to rescue the crew and retake the Mayaguez after it had been seized in the Gulf of Thailand by Cambodians in 1975. His report cited section 4(a)(1) of the Resolution covering the introduction of forces into hostilities, but gave as authority for his actions, the power of the Excutive and the authority of the President as Commander-in-Chief.[21] President Carter reported on the Iranian hostage rescue operation on April 26, 1980, two days after the unsuccessful attempt had been mounted. Carter's action could clearly be construed as a counterterrorism measure aimed at Iranian state supported terror. The President stated in his report to the Congress that the operation was ordered and conducted under the President's Constitutional powers as Chief Executive and Commander-in-Chief of the U.S. Armed Forces, expressly recognized in section 8(d)(1) of the War Powers Resolution.[22]

More recently, at about 4 p.m. on the afternoon of April 14, 1986, within approximately three hours of U.S. warplanes reaching their targets, President Reagan consulted with key Congressional leaders regarding his planned preemptive action against terrorist infrastructure and supporting military installations in Libya.[23] On this occasion, the White House indicated that while there was little time between the consultation and the initiation of the strikes, the warplanes could have been called back if strenuous opposition had been voiced by those members consulted.[24] The pattern which seems to have evolved since 1973 suggests an executive branch policy of avoiding confrontation with the Congress but which at the same time makes no specific concession as to the applicability or even the overall Constitutionality of the Resolution.[25] It seems likely that this general policy will continue and may very well have an impact on whether and how there is to be WPR consultation in the case of an extraterritorial apprehension which employs U.S. Armed Forces.

In the event U.S. Armed Forces are used to conduct or otherwise support extraterritorial apprehension, there may be strong Congressional pressure to apply the Resolution. Although the Resolution is silent on who is to be consulted within the Congress and when, past practice seems to suggest that the Executive is not required to consult well in advance or with more than a limited number of members. If the Iranian hostage rescue mission is an appropriate precedent for highly sensitive pro-active counterterrorism measures, it may be acceptable to consult after-the-fact. But to completely avoid consultation altogether where U.S. Armed Forces are engaged in even a limited armed intervention of a sanctuary state or stateless area where resistance may be expected, will raise serious political, if not legal, challenges to the Executive's action.

It may very well be that the Executive could prevail in a legal challenge as to the Constitutionality or intentional nonapplication of the WPR. Nothing in the legislative history or on the face of the Resolution itself requires consultation when deploying the U.S. Armed Forces in support of a pro-active counterterrorism measure, particularly one in which enforcement is the principal objective. However, the broader issue at stake is developing and maintaining an essential spirit of mutual support and cooperation between the legislative and executive branches of government.

Despite the difficulties related to its application, the experience since 1973 demonstrates that the Executive benefits from widespread Congressional support which usually results from legislative involvement either before or concurrent with the commitment of the U.S. Armed Forces. Even though the argument may be made that the Resolution need not apply to the use of U.S. Armed Forces in the case of limited counterterrorism measures, the Executive should carefully weigh the overall constitutional

if not political interests, responsibilities, and authority of the Congress before choosing to ignore it. Overall, it would seem the political benefits which would stem from a partnership between the branches in this area, strongly militates in favor of a dialogue of some type, whether by means of the WPR or some other vehicle.

Intelligence Oversight

With respect to covert actions by the U.S. Government, the Congress has sought to legislate its relationship with the Executive through the adoption of the Intelligence Oversight Act of 1980[26] and various related provisions in the intelligence authorization acts adopted for particular fiscal years.[27] The Intelligence Oversight Act of 1980 was adopted as part of the Intelligence Authorization Act for Fiscal Year 1981 and was codified as Title V of the National Security Act of 1947.[28] The 1980 Act requires that the Director of Central Intelligence (DCI) as well as heads of departments, agencies, and other entities in the U.S. Government involved in intelligence activities keep the Select Committee on Intelligence of the Senate and Permanent Select Committee on Intelligence of the House of Representatives "fully and currently informed of all intelligence activities" including "any significant anticipated intelligence activity." The latter term is specifically defined by way of an amendment to the Hughes-Ryan Amendment[29] to include all CIA covert action operations. Prior to 1980, the law required that eight separate committees of the Congress be notified of such operations.[30]

Section 413(a)(1) of the Act specifically provides that the provision to fully inform of all intelligence activities shall not require the

President to seek approval of the committees prior to initiation of any anticipated intelligence activity, if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States. When such a Presidential determination is made, notice of the significant anticipated intelligence activity is to be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and the minority leader of the House of Representatives, and the majority and minority leaders of the Senate.[31]

The 1980 Act also contains provisions which protect the Executive's discretion with regard to intelligence operations. The initial proviso to section 413(a) provides that the reporting obligations in this subsection exist only

> ...to the extent consistent with all aplicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information related to intelligence sources and methods... 32

Under this provision, the Executive has some basis for withholding information from the Congress entirely, when to do so is within his constitutional powers or disclosure to the Congress would unacceptably increase the risks of unauthorized disclosure. But there are definite limits on the Executive's discretion to withhold information. Section 413(e) of the Act contains a clear limitation in its proviso on legislative construction:

> Nothing in this chapter shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources or methods. 33

Notwithstanding this limitation on Executive discretion, the preambular language of section 413(a) is still regarded as a solid basis for the Executive to withhold prior notice of a covert action from the Congress. This interpretation is supported by section 413(b) of the Act which expressly authorizes the President to inform the intelligence committees in a timely fashion of covert actions for which prior notice was not given. In such instance, section 413(b) requires the President to provide a statement of the reasons for not providing such notice.[34]

Even with the Intelligence Oversight Act and other provisions of the law contained in the annual intelligence authorization acts, various ambiguities continue to exist regarding the relative responsibilities of the legislative and executive branches in the area of covert operations. The President's substantial national security and foreign affairs powers arise from his Article II Constitutional grant of authority as national "Commander-in-Chief" and as the executive officer charged with making of treaties and providing for the appointment of ambassadors. The Supreme Court in United States v. Nixon[35] and United States v. Reynolds[36] specifically recognized that the President's substantial Constitutional authority was broad enough to permit withholding certain limited categories of sensitive information from the Congress.

The Congress can just as legitimately cite its various Article I powers as a basis for its maintaining a reasonable level of oversight over the covert activities of the intelligence agencies. While the Executive may resist or attempt to constrain Congressional efforts to force consultation or some form of notification of significant covert actions, the realities of shared government power and legislative control over appropriations argues strongly for the development of a partnership between the branches if policy and strategy are to be effectively developed and carried out.

A number of potential issues arise in attempting to apply the Intelligence Oversight Act of 1980 to extraterritorial apprehension. If the CIA is designated to actively participate in an extraterritorial apprehension, the Hughes-Ryan Amendment[37] will require that the President find that such an operation is important to the national security of the United States.[38] Once the President so determines and authorizes CIA involvement beyond a mere intelligence gathering role, he is mandated under Hughes-Ryan to treat the involvement as a "significant anticipated intelligence activity" for purposes of section 413 or Title 50. The activity must then be reported under the Intelligence Oversight Act, unless the Executive maintains his constitutional prerogative to withhold notice from the Congress. In the event the Executive elects to withhold notice he will have to provide the required statement describing the authority under which he does so or be prepared to face political and legal challenges if the activity is discovered by the Congress. It is very likely that CIA involvement in an extraterritorial apprehension would eventually become public.

It is doubtful the Congressional intelligence committees would long accept an Executive plan in which they receive notice of extraterritorial apprehension after-the-fact. If troublesome political controversy arises over the extraterritorial apprehension as a result of Congressional irritation with *ex post facto* reporting, an unnecessary constraint would be placed on the future application of the measure by executive branch decision-makers wishing to avoid unnecessary conflict with the Congress.[39]

Considerable disagreement may also arise regarding what constitutes reportable "intelligence activities" or "intelligence operations in foreign countries" under the Act. Is an extraterritorial apprehension in a stateless area or a sanctuary state an "intelligence activity?" Is it an "intelligence activity in a foreign country when the apprehension is conducted in a stateless area? Could the Executive argue that if no intelligence operatives are involved and if the mission is clearly in support of the law enforcement functions of the Government, it does not fall under the Intelligence Oversight Act reporting requirements? There is no indication in the legislative history that the Congress contemplated pro-active counterterrorism measures in establishing the intelligence oversight system. Certainly extraterritorial apprehension was not considered when Congress established the oversight procedures for the intelligence agencies. Neither the Act itself nor its legislative history provide clear answers to the many questions surrounding application of the Intelligence Oversight Act to counterterrorism measures like extraterritorial apprehension.

There is also the issue of whether, and under what circumstances, special warfare or other unique unconventional military operations become reportable under the Intelligence Oversight Act. Although Hughes-Ryan appears to automatically require notification of most operations in which the CIA has an active role, no such requirement is legislatively imposed on other departments or agencies. An important consideration in developing and planning a counterterrorism measure which could be construed as an "intelligence activity" or "intelligence operation" and which may be carried out by a department or agency other than the CIA, is whether the

Congress may elect to explicitly expand its oversight authority to activities not previously subject to its review.[40] Congressional action to legislate oversight over departments and activities not previously subject to legislative monitoring could represent a significant political cost for the executive branch. The mere possibility of incurring such a cost militates in favor of the Executive developing at least an informal understanding with the Congress with regard to the areas of ambiguity in intelligence oversight reporting of extraterritorial apprehension missions.

Reconciling Executive and Legislative Roles

As is clear from even a cursory review of the War Powers Resolution and the Intelligence Oversight Act of 1980, there remains substantial ambiguity regarding the authority and responsibilities of the two branches in the area of pro-active counterterrorism measures. This ambiguity has the clear potential for giving rise to divisive political and legal disputes between the two branches. Such disputes, should they occur, will only serve to undermine the chances of developing an effective, broad-based counterterrorism policy and strategy.

Citing the danger inherent in the Congress and Executive not working cooperatively with regard to war powers and intelligence oversight, Senator Durenberger recently made these remarks to the John Hopkins School of Advanced International Studies:

> My problem with the War Powers and Intelligence Oversight frameworks is that they will more often operate to inhibit rather than encourage...consultation, because of the intricate legal [gamemanship] that inevitably results.
>
> The executive branch spends its time figuring out whether and how a particular activity fits into either framework, when we might be conducting a more meaningful exchange of ideas on the

> wisdom of underlying basic policy, or even the advisability of a particular operation as a whole.
>
> This is not a theoretical problem. It exists today. In the view of the Administration, notification of Congress is tantamount to public disclosure. Therefore, in shaping the options available to counter a terrorist threat, planners in the executive department limit their consideration to actions which do not fall under the War Powers Act. What may be the most effective course of action from the military or political point of view may be rejected because of the current requirements for notification.
>
> In short, the Administration may prefer to do the wrong thing in secret, rather than doing the right thing with congressional knowledge.
>
> The system has truly been stood on its head -- and the effect could be disastrous. [41]

In developing a counterterrorism option of extraterritorial apprehension, the benefits to be derived from a meaningful partnership with the Congress far outweigh the costs. The implementation of the partnership may be based on the nonspecific War Powers Resolution system in which the Executive typically elects to consult with key membes of the congressional leadership. Alternatively, such a partnership could be based upon the existing intelligence oversight system. The latter system offers the substantial advantages of being permanently in place, tested, and able to maintain operational security. The recipients of the information for the Congress are limited in number and may be granted appropriate security clearances.

In April of 1986, Senate Majority Leader Robert Dole joined other Senators in introducing legislation which would grant the President expanded powers to respond to terrorist acts. The legislative proposal exempts counterterrorist actions conducted by military forces from the constraints of the War Powers Resolution.[42] Extraterritorial apprehension as a "counterterrorism action" would fall squarely within the purview of this proposed legislation. The bill eliminates any requirement for advance consultation with the Congress and authorizes both preemptive and punitive strikes in response to terrorist threats from abroad. Other provisions in the proposed legislation require the President to report the results of actions taken under this Congressional "authorization."[43] If this legislative proposal is adopted in one form or another, it will serve as the foundation for the Executive's partnership with the Congress in implementing a counterterrorism measure of extraterritorial apprehension.

Specific Limitations on Planning and Execution

Apart from the constraints imposed by the War Powers reporting and intelligence oversight requirements, a number of specific organizational and functional limitations could impact upon the development of extraterritorial apprehension as a counterterrorism measure. No exhaustive list of such limitations can be provided in the absence of highly specific apprehension scenarios. Nevertheless, a number of limitations can be identified which are likely to have a general impact on a range of possible scenarios. Since such limitations may influence the preparation of operational plans and organizational structures, it is useful to include them among the considerations to be reviewed.

Executive Order 12333

Executive Order 12333 of December 4, 1981 establishes an executive branch intelligence oversight and accountability structure. The Order specifies the jurisdictional responsibilities of the intelligence agencies as well as certain substantive rules and limitations governing the conduct of their activities. The substantive rules are of general applicability with detailed implementation left to regulations ("procedures") promulgated by the head of each intelligence agency. Such regulations are subject to review by the U.S. Attorney General.

The involvement of the Department of Justice in the elaboration of these rules was so extensive during the Ford and Carter Administrations, that under the latter, it was necessary to create a separate office within the Justice Department known as the Office of Intelligence Policy and Review.[44] This office reviews agency regulations and procedures and approves applications submitted by the agencies made to the Foreign Intelligence Surveillance Court established under the Foreign Intelligence Surveillance Act.[45]

Executive branch oversight is further developed under E.O. 12334 signed December 4, 1981.[46] This order reestablishes the President's Intelligence Oversight Board (PIOB). The PIOB consists of three members who are charged to safeguard the lawfulness of activities of the various intelligence agencies. Board members are to be distinguished citizens from outside the Government. They are required to inform the President of intelligence activities which any member believes are in violation of the Constitution or laws of the United States. The PIOB is also required to perform a variety of oversight functions including reviewing practices and procedures of the inspectors general and general counsels of the intelligence community to ensure that the intelligence system maintains a check on its own actions. It may be appropriate for the PIOB to review the legality of extraterritorial apprehension in support of any NSC study of this counterterrorism strategy option.

Additional executive branch oversight results from review procedures within the departments and agencies themselves. One of the principal purposes of these internal agency procedures is to ensure sensitive activities are reviewed and approved by senior agency officials. The general counsel for each of the agencies, or, in the case of the military departments, their respective Judge Advocates General, are given substantial responsibilities along with senior deputies to ensure oversight and proper implementation of E.O. 12333.[47] Depending upon which departments and agencies may be charged with conducting an extraterritorial apprehension, these internal procedures will be brought to bear to review not only the lawfulness of the proposed operational plan, but also its overall value from a policy and operational perspective.

Under Executive Order 12333, covert actions are euphemistically designated as "special activities" and are defined as:

> Activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or related support functions.[48]

If a proposed "special activity" fits within this definition, it is subjected to the E.O. 12333 executive review procedures by the proposing agency which forwards it to the NSC staff for presentation to the NSC principals themselves. It is not at all clear that extraterritorial apprehension would constitute a "special activity" as defined in the Order. Although planning for a specific extraterritorial apprehension would be highly classified to ensure the success of the operation and safety of the apprehending force, it would not be actively "planned and executed so that the role of the United States Government is not apparent or acknowledged publicly." Moreover, the very operation itself could be viewed as intended, at least in part, "...to influence the political processes, public opinion, policies, and media..." within the United States.

Once again, it is not completely clear whether an existing management and oversight system applies to the proposed counterterrorism measure of extraterritorial apprehension. In any case, operations mounted in support of a publicly acknowledged apprehension may have to remain covert and unacknowledged. At minimum, such supporting operations would be subject to the E.O. 12333 and internal agency review and determination processes.

Best known of the substantive rules contained in E.O. 12333 is the prohibition on engaging in "assassination" or participating in or requesting others to do so. This provision could be publicly or secretly canceled or selectively suspended as has been openly proposed in the media and even in pending legislation.[49] However, most extraterritorial apprehension scenarios would not include such "direct action" as an objective. Measures to apply on-scene force during the apprehension phase would be mounted for the express purpose of providing for the self-defense of those conducting the seizure and would appear to fall well outside the purview of the Order's prohibition on assassination.

Limitations on Performing Law Enforcement Functions

The CIA is precluded by the National Security Act of 1947 from exercising any "police, subpoer [or] law enforcement powers."[50] However, E.O. 12333 does authorize intelligence agencies to provide assistance to law enforcement authorities:

> Para. 2.6. Assistance to Law Enforcement Authorities. Agencies within the Intelligence Community are authorized to:
>
> . . . .
>
> (b) Unless otherwise precluded by law or this Order, participate in law enforcement activities to investigate or prevent intelligence activities by foreign powers, or international terrorists or narcotics;
>
> . . . .
>
> (d) Render any other assistance and cooperation to law enforcement authorities not precluded by applicable law.[51]

This paragraph appears to authorize the CIA to assist the Department of Justice in the apprehension of suspected terrorists on foreign soil. There may be some question as to whether CIA involvement in an extraterritorial apprehension would constitute a direct exercise of law enforcement powers prohibited under the National Security Act of 1947 itself. There may also be a question as to whether the Agency would be acting pursuant to a valid request for assistance and delegation of authority from the Department of Justice. A defense counsel representing an apprehended terrorist will almost certainly argue that any role the CIA plays in the apprehension represents more than mere "assistance" and is instead a direct assertion of law enforcement authority prohibited under the 1947 Act.

In United States v. Reed[52] discussed in Chapter II of this study, CIA agents operated in the Bahamas in apparent support of the FBI. The issue of the Agency's authority to provide such support was not seriously challenged or litigated on appeal. It appears likely that if planners ensure that the apprehension is documented as pursuant to the express request of the U.S. Attorney General and at the direction of the President, any defense challenge asserting a bar to the CIA's authority is bound to fail. It is likely that U.S. courts would view the 1947 National Security Act prohibition as one designed to preclude the CIA from acting on its own initiative and as an independent law enforcement arm of the Government. They are unlikely to rule that CIA involvement is a violation of the Act when it is performed on a case specific basis, at the express request of the chief U.S. law enforcement officer, and subject to the close direction of the President.

The Posse Comitatus Act prohibits military departments from participating in law enforcement activities, except as specifically authorized by the Constitution and the laws of the United States.[53] The Act does not have general application outside the United States and moreover, exceptions can be granted by the U.S. Attorney General. Amendments adopted by the Congress in 1981 were designed to authorize the use of the military in support of the U.S. Coast Guard and other civilian law enforcement agencies engaged in the interdiction of both international and domestic drug smuggling.[54] The Posse Comitatus Act does not preclude the use of the U.S. Armed Forces in extraterritorial apprehension. There is no indication that the Act in any way inhibited U.S. Navy participation in the interception and diversion of the Egypt-Air 737 in the Achille Lauro case, a clear instance of direct support for a law enforcement function.

In United States v. Cotten,[55] the defendants were seized and forcibly removed from South Vietnam to Hawaii at the direction of U.S. Government personnel. In addition to charging their Constitutional rights were violated, the defendants objected to the use of U.S. Air Force aircraft and personnel to forcibly return them to the United States, asserting a violation of 18 U.S.C. 1385. This code provision provides that whoever willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws violates Federal law. The court dismissed the defendants' claim noting that the remedy for the conduct complained of, if any remedy even existed, was not divestiture of jurisdiction by the court.

To ensure the Posse Comitatus Act is not an issue either overseas or upon return to U.S. territory, planners should ensure that military units act at the express request of and under the authorization of the U.S. Attorney General. Legal challenges which have resulted from the U.S. Navy's support of the Coast Guard in its drug interdiction operations, demonstrate the extreme importance of having such requests and authorizations well documented in advance. Operational orders should reflect any waivers to the Act so that on-scene commanders understand they are acting with proper authority and in support of a law enforcement function. Applicable Department of Defense and military department instructions which regulate the provision of assistance to civilian law enforcement agencies should be carefully followed to assist U.S. federal prosecutors in easily defeating defense objections based on alleged violation of the Posse Comitatus Act.

International Reaction to Extraterritorial Apprehension

Presenting the U.S. Position

A major consideration for the U.S. Government in evaluating extraterritorial apprehension as a counterterrorism strategy is the reaction of the international community at large and the Western allies in particular.

U.S. economic and military actions taken against Libya in 1985 and 1986 clearly demonstrate a willingness to undertake unilateral action and, when necessary, to take the lead in combatting terrorism. Nevertheless, there is a clear recognition of the need for international cooperation in addressing the problem. While the Western Summit Conference in Tokyo in May of 1986 recognized the right of nations to take unilateral actions, the meeting as a whole emphasized the need for greater international cooperation.[56]

Western leaders at the Tokyo summit meeting reportedly discussed a range of counterterrorism options including improved international law enforcement through greater use of extradition.[57] There was no indication that extraterritorial apprehension or any form of irregular rendition were discussed. Consistent with the U.S. commitment to improved cooperation with the allies in combatting terrorism, it would seem advisable to quietly but firmly inform them of any U.S. intention to exercise extraterritorial apprehension as a counterterrorism measure. During the course of consulting with the allies on this subject, the legal and policy reasoning in support of extraterritorial apprehension should be thoroughly explained. U.S. representatives should note that the municipal courts in many nations including the United Kingdom, Belgium, Canada, France, and Israel among others, have ruled to retain jurisdiction of offenders notwithstanding their irregular rendition.[58]

The United States should emphasize that it is exercising jurisdiction on a very selective basis in an application of the protective principle of jurisdiction and basing its limited intervention on what it considers to be a serious, continuing, and imminent threat to its vital or major national interests. During these consultations, the point should be made that extraterritorial apprehension will be directed against the international terrorist leadership and operational elites operating in stateless areas and sanctuary states where there appears to be little or no hope of gaining good faith prosecution or extradition. The purpose of these allied consultations would be to gain multilateral support in the aftermath of an actual extraterritorial apprehension, or, at minimum, quiet acquiescence to unilateral U.S. action.

U.S. spokesmen should be prepard to make substantially the same legal and policy case to the world community following the first actual apprehension. While the official reaction from nonaligned states and the Socialist bloc countries will probably be negative, the United States must nevertheless make its case with clarity and conviction. The following should be emphasized: that the United States acts as a matter of self-help out of its right to individual self-defense, that its action is directed against only those states and stateless areas which harbor or support terrorists and frustrate accepted procedures for prosecuting or extraditing those who threaten international peace and security, and that the action is undertaken with the objective of avoiding more forceful measures which would also have been justified under the circumstances. The latter point may prove the most persuasive when making the political and legal case to both the nonaligned and Socialist bloc states. In general, these states might be expected to prefer the least coercive counterterrorism response and may see it in their interest to reluctantly accept this option as the "lesser of the evils" under the circumstances.

U.N. Resolutions as Source of Support

Recent United Nations resolutions in both the Security Council and General Assembly provide added impetus to the political, if not legal, case in support of pro-active counterterrorism measures. While these resolutions do not constitute international law *per se*, they provide evidence of a growing political consensus among the 159 U.N. members that state sponsored terrorism is contrary to the principles and objectives of the world organization. On December 19, 1983, the General Assembly denounced terrorism and called on all states

> to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State, or acquiescing in organized activities within their territory directly toward the commission of such acts. 59

On December 9, 1985, the General Assembly approved an even stronger condemnation of terrorism in resolution 40/61 which declares *inter alia* that it:

. . . .

> 8. *Further urges* all States to co-operate with one another more closely, especially through the exchange of relevant information concerning the prevention and combatting of terrorism, apprehension and prosecution or extradition of the perpetrators of such acts, the conclusion of special treaties and/or the incorporation into appropriate bilateral treaties of special clauses, in particular regarding the extradition or prosecution of terrorists. 60

Just nine days later, on December 18, the Security Council adopted a resolution sponsored by the United States, Britain, France, Australia, Denmark, Egypt, and Peru which focused on incidents of hostage-taking and terrorist abduction. In addition to "condemning all acts of terrorism, including hostage-taking" and recalling the General Assembly Resolution 40/61 adopted earlier in the month, Resolution 579 provides that the Security Council:

> 4. Appeals to all States that have not yet done so to consider the possibility of becoming parties to the International Convention against the Taking of Hostages adopted on 17 December 1979, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents adopted on 14 December 1973, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation adopted on 23 September 1971, the Convention for the Suppression of Unlawful Seizure of Aircraft adopted on 16 December 1970, and other relevant conventions;
>
> 5. Urges the further development of international co-operation among states in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of international terrorism. 61

Resolution 579 with these provisions was adopted by all fifteen members of the Security Council without debate. Although the "effective measures" called for by this Resolution are certainly not intended to include extraterritorial apprehension, the Resolution on its face can be read to encourage devising measures apart from those contained in the antiterrorist conventions. The case may be made that extraterritorial apprehension is justifiable as a measure of self-help in international law and is an "effective measure" within the scope of this resolution.

These recent declarations of both the General Assembly and Security Council are strong condemnations of international terrorism. The unanimous Security Council action represents a major political setback for international terrorists and their state sponsors. While nothing in these Resolutions can be read as specifically authorizing extraterritorial apprehension, the U.S. political case must take note that its actions are fully consistent with the political emphasis the United Nations has placed upon the prosecution of terrorists and the encouragement of nations to actively cooperate in extradition measures.[62]

Advanced Coordination of Allied Support

Apart from the United States engaging in advanced consultation with its Western allies and making the general case to the world community in support of extraterritorial apprehension, direct negotiations may be necessary with one or more allied or friendly nations for the purpose of securing specific logistical or intelligence support. There may be instances where the apprehension involves units or agents of an allied or friendly foreign country. In other instances it may be useful to agree in advance as to which of several countries will apply its municipal criminal law and assume in personam jurisdiction over the apprehended terrorist offender(s). In any case, these and other matters should be the subject of advanced international coordination and agreement with interested states. In the Achille Lauro case, there was insufficient time to negotiate the details of the apprehension in advance. However, if extraterritorial apprehension is adopted as a counterterrorism measure, most operational plans could be designed to facilitate the necessary advanced coordination with those countries which would be asked to participate or provide support.

One matter which should not be overlooked in planning advanced coordination with allied or friendly nations is the possibility of inadvertently exposing an apprehended terrorist to third country foreign criminal jurisdiction. Once the apprehension is completed, it will be necessary to transport the terrorist or group of terrorists to the United States or some other pre-selected forum state for arraignment and prosecution. The transportation can best be facilitated through the use of either a naval vessel or military aircraft. Depending upon the proximity of U.S. Naval vessels to the apprehension site, the apprehending units or force may be able to simply transfer the terrorist part or all the way back to the United States aboard a fleet unit. Alternatively, the terrorist may be put aboard a U.S. Air Force C-130, C-141, or C-5 equipped for inflight refueling.

In the event neither of these techniques can be used, it may be necessary to make intransit stops in allied friendly foreign countries. Once an apprehended terrorist is landed in a foreign country, he or she will become subject to its civil and criminal law unless that country has affirmatively waived jurisdiction. For this reason, unless the United States is prepared to allow a foreign country to assume jurisdiction over the apprehended terrorist, he or she should be either transferred directly back to the United States or a waiver of foreign criminal and civil jurisdiction arranged in advance for any non-U.S. area where an intransit stop is contemplated.

As an alternative, the United States may be able to assert sovereign immunity over the vehicle transporting the terrorist. In the case of warships, the doctrine of sovereign immunity is widely recognized under international law. So long as the terrorist remains on board the warship and in the absence of consent by the commanding officer, no foreign authority would be permitted to come aboard even in a foreign port for the purpose of assuming jurisdiction or custody over the apprehended terrorist.

A number of countries including some U.S. allies have not been prepared to acknowledge the application of the principle of sovereign immunity to military or other state-owned aircraft. If the principle is applied, a military or state-owned aircraft may land in an intransit status and not be subject to search or inspection. Cargo and passengers remaining onboard would also be free of any assertion of jurisdiction by the host nation. However, should an apprehended terrorist be landed in a state which does not recognize this principle as applicable to military or state-owned aircaft, serious difficulties could arise. Again, the best solution for this problem is advanced coordination with those states in which it may be necessary to make intransit stops or to avoid such stops altogether through a nonstop transfer to the United States or other prosecuting forum state.

CHAPTER V

CONSIDERATIONS FOLLOWING APPREHENSION

> I think it would be a great day for international justice if those terrorists were brought to the United States, to Washington, D.C. and were tried in a U.S. court...were convicted...and...imprisoned here, because we have the primary concern....We are not fighting fire with fire; we are fighting fire with justice...on established principles. 1
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> Senator Arlen Spector
> July 30, 1985

Being able to properly plan, execute, and justify a strategy of extraterritorial apprehension would be of no consequence if prosecutors are unable to secure a conviction. The very purpose of extraterritorial apprehension is to subject international terrorist elites to a fair trial under the constitutional guarantees afforded to defendants under the American or some other Western system of justice. In trying international terrorists dedicated to the destruction of the very system which seeks to hold them accountable, the government will be forced to respond to an array of political and legal tactics designed to undermine its prosecutorial efforts. These tactics may be ethical by legal standards, or they may be quite unethical. Prosecutors, the courts, and the public at large will have to be prepared to cope with an onslaught of such tactics. This chapter seeks to explore some of the tactics and the more critical problems which they present to the prosecuting nation, its government and its people.

Use and Protection of Intelligence Information, Sources, and Methods

Fair Trial Rights vs. Protection of National Security Interests

If there is one thing upon which the intelligence community and criminal prosecutors agree, it is that the protection of sensitive intelligence information, sources, and methods in a criminal proceeding can be a challenging task. Of the issues to be considered in evaluating a strategy option of extraterritorial apprehension, none is more troublesome, or important, than ensuring effective prosecution, protection of sensitive intelligence information, and a fair trial for the defendant, all in the same proceeding. Although each case will have its own unique set of national security issues, it is important to recognize the legitimate interests of both the defendant and the Government along with available measures which may serve to reconcile these interests where they are in conflict with one another.

It is difficult to imagine a trial of an international terrorist brought before the court by means of extraterritorial apprehension where classified information, sources, and methods would not become an issue. It is likely that as the Department of Justice constructs its criminal case against such terrorists, it will do so on the basis of highly classified information. This information may relate to the identification of particular terrorists, their location at various points in time, the acts which they are alleged to have committed, their future plans, their associations with other terrorists or sponsoring governments, their source of financial or arms support, and the methods they employ. Such information will be essential in the planning and execution of the extraterritorial apprehension of the terrorist or terrorists.

At least some of this information will also be important in establishing the proof that a terrorist committed an offense under the laws of the prosecuting state. Not all such intelligence derived information will be relevant or admissible during the course of the criminal trial. However, constitutionally based fair trial rights require that the accused know the evidence to be introduced against him and be able to examine and, if appropriate, rebut it. In terms of the procedures used in his arrest, the securing of evidence, and other investigative matters, he also has substantial rights to know how the Government developed its case. Such information assists in confirming that the evidence presented at the trial has been obtained consistent with Constitutional limitations and is not subject to exclusion under the so-called "exclusionary rule." In other words, even the terrorist defendant has a right to confirm that the evidence against him is not "tainted" or improperly secured in violation of those Constitutional rights afforded to him, even as a foreign national apprehended beyond U.S. borders. At issue is whether sufficient evidence can be presented to adequately and fairly try the case for both prosecution and defense, and at the same time protect sensitive classified information, the disclosure of which would be damaging to national security.

The Classified Information Procedures Act

Prior to 1980, the conflict between introducing sufficient evidence into a criminal proceeding and protection of sensitive national security interests might well have precluded serious consideration of extraterritorial apprehension as a counterterrorism strategy. However, during the 1970s, U.S. prosecutors confronted several serious cases in which classified national security information played a critical role in trial proceedings. Known as the "graymail cases," these trials involved former intelligence agents and others who had had accesses to classified information and who threatened to expose or demand the Government expose such information during criminal proceedings. The defendants in these trials attempted to force the Government to dismiss the cases by claiming that they could not receive a fair trial unless the Government disclosed, or they were allowed to disclose, highly classified information. The Government faced the dilemma of trying the case and exposing the classified information or, alternatively, dismissing the charges against the defendants as the price for protecting highly classified information.

Congress responded by adopting the Classified Information Procedures Act of 1980 (CIPA).[2] In adopting CIPA, it was the purpose of Congress to put an end to the "graymail" dilemma. The Congress wished to find a procedural means by which to afford the criminal defendant his fair trial rights but at the same time preclude the defense from using classified information to maneuver the Government into a forced dismissal of the proceedings.[3]

Section 1 of CIPA provides a definition of terms including "classified information" and "national security." Under subsection (a), "classified information" is defined as:

> [A]ny information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 [42 U.S.C. Sec. 2014(y)] [4]

Subsection (b) defines "national security" to mean the "national defense and foreign relations of the United States." The courts have consistently ruled that both of these key terms are sufficiently clear to inform the accused of the nature of classified information and national security.

Under section 2 of the Act, at any time after the filing of a criminal indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. The federal district court must then conduct a pretrial conference to establish the timing of requests for discovery. This conference also serves to initiate a procedure established by section 6 of CIPA to determine the use, relevance, or admissibility of classified information. Section 2 further provides that during the course of this conference "the court may consider any matter which may promote a fair and expeditious trial." However, substantive issues concerning the use of classified information are to be decided at a separate hearing required under section 6.

Section 3 provides for court protective orders which may direct the defendant not disclose classified information already known to him or which is made available by the Government during the course of the prosecution. This provision may have little application in the prosecution of an apprehended terrorist. Unlike many of the "graymail cases" where defendants had had prior legitimate access to classified information as former agents or government employees, any classified information disclosed to terrorists during an extraterritorial apprehension operation will be considered effectively "compromised" and presumably no longer subject to protection. Section 3 of CIPA has been interpreted to provide the Government the right to request the issuance of protective orders ex parte and in camera, that is, before the court in the absence of other parties (e.g., the defendant) and in confidence or secret. A part of section 3 which may prove useful in terrorist prosecutions are provisions allowing the court to establish controlled handling of classified information throughout the course of proceedings including on appeal. Violation of court orders issued pursuant to section 3 are punishable by contempt of court.

Section 4 of CIPA provides that upon its request, the Government may be authorized to avoid disclosure of classified information through the use of alternative forms of evidence. Specifically, in responding to the defendant's discovery requests and upon a sufficient showing by the Government, the court may authorize the prosecutor to delete certain items of classified information. In lieu of the information being deleted, the Government may be permitted to substitute a summary of the information, or to substitute a statement admitting the relevant facts that the classified information would tend to prove. Closely resembling procedures contained in Rule 16(d)(1) of the Federal Rules of Criminal Procedure,[6] this provision authorizes prosecutors to demonstrate in an ex parte, in camera submission to the court, that the use of such alternative forms of evidence is warranted.

The legislative history of section 4 establishes that the court may take national security interests into account when considering the prosecution's request to allow deletions, substitutions, or summarizations of classified information.[7] The importance of national security interests in these judicial evaluations has been recently underscored by the First Circuit Court of Appeals decision in United States v. Pringle.[8] In

Pringle, the defendants sought discovery of classified materials relating to the surveillance, boarding, and seizure of a ship which they had used to smuggle narcotics. The federal district court, applying principles enunciated by the Supreme Court in Roviaro v. United States[9] and determining that the classified information sought was not properly a matter for discovery under Rule 16 of the Federal Rules of Criminal Procedure and Brady v. Maryland,[10] held that the defendant's interest in gaining the information was outweighed by the concomitant prejudice to the national security. In affirming the lower court decision, the Circuit Court held:

> We also reject defendants' contention that the protective orders issued by the district court violated their due process rights. We have reviewed the classified information and agree with the district court that "it was not relevant to the determination of the guilt or innocence of the defendants, was not helpful to the defense and was not essential to a fair determination of the case.[11]

The First Circuit holding interpreted the Supreme Court ruling in Roviaro to require the district court to "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense."[12] Section 4 of CIPA establishes the mechanism for the court to perform this crucial task of balancing this critical public interest against the defendant's fundamental fair trial rights.

The actual procedures for trying cases involving classified information are contained in section 6 of CIPA. Under this section, adversarial hearings may be conducted *in camera* to determine the use, relevence, and admissibility of the classified information concerned.[13] Prosecutors may notify the defendant at a hearing provided for under section 6 of classified information which will be at issue during the trial. However, with the court's approval, it may provide a "generic description" of the classified material in lieu of disclosing the actual information itself, particularly parts which may tend to disclose sources and methods.[14]

If the court determines that the classified information at issue is not relevant or admissible, the trial proceeds without the information. However, if it determines that it is relevant and admissible, then the Government is afforded the right under section 6(c)(1) to request the court order the defendant to accept as a substitute, a statement "admitting relevant facts that the specific classified information would tend to prove" (i.e., a stipulation of facts), or "a summary of the specific classified information." Section 6(c)(1) further requires the court to grant such motion if it finds that the statement of the summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.

The court may allow a summary or stipulation in lieu of disclosure only if "the defendant's right to a fair trial will not be prejudiced."[15] The concept of the legislation is that the defendant should not stand in a worse position as a result of the alternative forms of evidence. The statutory standard is "substantially equivalent disclosure" by which the Congress did not intend precise, concrete equivalence.[16] Section 6(c)(2) of CIPA allows the Government to submit to the court an affidavit of the U.S. Attorney General "certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information." If requested by the Government, section 6(c)(2) requires the court to examine the affidavit ex parte, in camera.

Other provisions in section 6 authorize the court to impose a sliding scale of sanctions against the Government as a means of compensation for the defendant's inability to present proof regarding specific items of classified information. Sanctions may include dismissal of the indictment, dismissal of specific criminal counts of an indictment, finding against the Government on issues to which classified material relates, or striking or precluding all or part of the testimony of witnesses.[17]

Section 7 of the Act provides for an interlocutory appeal by the Government from any decision or order of the trial judge "authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosures of classified information.[18] This provision, which also provides for expedited consideration at the appellate court level, is intended to alleviate the "graymail" dilemma of "disclose or dismiss" which previously had to be addressed by prosecutors during the course of district court proceedings.

Section 8(a) specifically recognizes the classification of writings, recordings, and photographs containing classified information remains an executive, not judicial function. Concomitant section 8(b) clarifies the so-called "rule of completeness" found in Rule 106 of the Federal Rules of Evidence. The "rule of completeness" provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at the time to introduce any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.[19]

To preclude "unnecessary disclosure" of classified information, section 8(b) of CIPA permits the court to order admission into evidence of only a part of a writing, recording, or photograph. Alternatively, the court may order into evidence the whole writing, recording, or photograph with excision of all or part of the classified information contained therein. The provision does not provide grounds for excluding or excising part of a writing or recorded statement "which ought in fairness to be considered contemporaneously with it." Accordingly, the court may admit into evidence part of a writing, recording, or photograph only when fairness does not require the whole document to be considered.[20]

Finally, section 8(c) affords the prosecutor a means of precluding a witness from disclosing classified information in response to defense counsel's questions posed at either pretrial or trial proceedings. Under CIPA, if the defendant's counsel knew that a question or line of questions would result in disclosure of classified information, notice should have been provided the Government under separate section 5 of the Act and the matter resolved during a section 6 hearing. Section 8(c) is designed to supplement these procedures by allowing prosecutors to object to any question or line of inquiry requiring a witness to disclose classified information. The court then requires the Government and defense to proffer information in support of their respective positions.

Application of CIPA During Prosecution

The mechanism afforded by CIPA must be understood in the context of Congressional purpose and the judiciary's constitutional mandate to afford the criminal defendant a fair trial. The screening mechanisms provided by the Act are largely designed to protect the Government against defense threats to disclose information already in the defendant's possession, i.e., to address the graymail "disclose or dismiss" dilemma. It does, however, also protect information not known to the defendant but potentially involved in developing the Government's case. The principal function of CIPA, as crafted by the Congress, is to provide uniform procedures under which the Government is made aware, prior to or even during trial, of whether classified information will have to be disclosed in open proceedings. Should that appear necessary, the Act affords prosecutors the opportunity to make an informed and reasoned decision on whether the interests in prosecuting outweigh the damage to national security which may occur as a result of disclosure.

CIPA does not change existing standards for determining the use, relevance, and admissibility of evidence in a criminal trial. United States v. Smith[21] decided by the Fourth Circuit in 1984, held that a district court conducting a section 6(a) hearing is not empowered to exclude classified evidence that is relevant to the accused's defense on the grounds that the prevention of harm to the national security outweighs the defendant's need. United States v. Collins[22] ruled that CIPA does not undertake to create new substantive law governing admissibility. In the final analysis, the Act does not reduce the Government's burden to produce sufficient evidence at trial to prove the defendant guilty beyond a reasonable doubt of each and every element of each count in its indictment. Nor is the Act a vehicle to prevent a defendant from marshalling sufficient relevant evidence to present a reasonable defense and to be able to challenge that evidence presented against him.

Appreciating that CIPA affords no panacea for difficult cases involving classified evidence, it nevertheless arms the prosecution with an important instrument with which to approach a very thorny problem. Where classified information available only to the Government in a terrorist prosecution is critical to the defendant's fair trial rights, it may be possible to apply the Act's mechanism for ex parte, in camera review of proposed substitutes or alternatives to the actual evidence itself. It may be possible to develop summaries or admissions which the court would review to ascertain whether the defendant is left in a position of having substantially the same ability to make his or her defense as if the classified information itself were disclosed at trial.

Ultimately, the success or failure of prosecution of an apprehended terrorist will depend upon three factors. The first of these is the absolute necessity of a high level of cooperation between members of the intelligence community and the prosecution team. Such cooperation must occur at the very earliest stages of prosecution case formulation and apprehension planning. A prosecution team with appropriate security clearances must ascertain as specifically as possible what evidence it will need at pretrial proceedings as well as at the trial itself. It will be necessary for prosecutors to have an understanding of what information, sources, and methods require absolute protection even at the risk of having a case dismissed or sanctions applied for failure to disclose. The prosecutors will have to fully appreciate that the overriding objective of the intelligence community is the preservation of reliable sources and methods. Without these sources and methods, there would simply be no intelligence. Equally important, the intelligence community will need to understand that intelligence information which is never applied in the interest of overriding national policy and strategy, serves no useful purpose.[23]

The second factor which will prove crucial to the effective prosecution of a terrorist case is the existence of an energetic, dedicated, and innovative prosecution team. Prosecutors will have to aggressively use the provisions of CIPA, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and existing federal case law to preclude unnecessary defense discovery and to protect classified information against disclosure. But they must do so while still allowing sufficient evidence to be introduced in support of the prosecution and the defense cases.

Early coordination between the intelligence community and the prosecution will greatly facilitate the development of independent lines of evidence which in no way rely upon classified sources or methods. When it is determined that a particular evidentiary showing is essential on the merits or for procedural reasons, but the available evidence cannot be disclosed, innovative prosecutors and intelligence officers may be able to identify other ways and means of obtaining essentially the same information through wholly independent and unclassified sources and methods.[24] The key in every case will be advanced planning, aggressive interdepartmental or inter-agency communication, close coordination, and innovative thinking.

Finally, successful prosecution will depend upon courts, both trial and appellate, which are prepared to actively exercise their judicial discretion in the interest of trying cases in which very substantial interests of the adversarial parties must be carefully balanced. Thomas Kennelly, an attorney experienced in both the prosecution and defense of cases involving national security issues, described this factor in connection with United States v. Felt-Miller

> I think our case demonstrates that where there is a will, there is a way. If the government and the court want to try a case, they'll find a way to do it. At least at the trial level. They'll find a way to do it whether or not you've got the Classified Information Procedures Act. What I would suggest, however...is that the legislation does not solve all the problems, any more than passing a constitutional amendment to balance the budget balances the budget.
>
> I think you've got to exercise a great deal of judicial discretion, and I would hope that in the future there might be a greater amount of executive discretion exercised before a case of this type is brought. [25]

The willingness of the court in Felt-Miller to exercise this discretion, in conjunction with the prosecution's innovative use of various protective mechanisms under the Federal Rules and CIPA, facilitated the presentation of Government's case using summaries and other alternatives to the actual disclosure of highly classified information. While the case was protracted, costly, and entailed the laborious handling and review of tens of thousands of classified documents, it was tried.[26]

The court's willingness to exercise its inherent judicial powers will play a critical role in addressing issues which are not resolved in either the CIPA or the Federal Rules. For example, the introduction and management of classified information in grand jury or magistrate's proceedings will have to be governed by the district court's judicial powers. These powers may also be required in instances where the defense counsel requires access to classified information but will not or cannot qualify for a security clearance. Court options include arranging for alternative counsel who can qualify for a clearance or imposing extraordinary protective orders on the use of the evidence.[27]

Ultimately, it will be the court which balances the Governmental interest in protecting classified information against the defendant's constitutionally guaranteed rights to a fair trial. Recent experience in Felt-Miller and other cases seems to suggest that the courts are prepared to take on this heavy responsibility at least where the Government selects its prosecution cases carefully. But as Mr. Kennelly noted in his remarks, "...where there is a will, there is a way." If it is the national will to prosecute terrorists in municipal courts, concerns for the protection of classified information, sources, and methods, should not stand in the way. With innovation, patience, and hard work, the problem can be resolved.

Defense Issues at Trial

An active, and very possibly dissident, defense team can be expected to challenge the Government's intended prosecution prior to and throughout the criminal proceedings. In addition to using "graymail" tactics and challenging the jurisdiction of the court, it seems likely the defense will raise a number of other defenses in an effort to defeat prosecution.

Act of State Doctrine

The act of state doctrine under international law provides that the court of one state will not judge the legality of an act committed by a government official of another state. During the Eichmann trial, Dr. Servatius, the defense counsel, argued on behalf of his client:

> one sovereign state does not dominate or sit in judgment on another sovereign state...[A] person who operates on behalf of a state, who carries out, in other words, an 'act of state,' cannot be tried for such an act, if it be criminal, by another state without the concurrence of the former...[N]ot the individual but

> the state on whose behalf he acts is responsible for any violation of international law.[28]

An international terrorist may argue that he is acting as a government agent of either a sanctuary state or even an organization which claims an internationally recognized status like the Palestinian Liberation Organization (P.L.O.).

The act of state doctrine is not likely to prove an effective defense for an international terrorist in U.S. and most Western allied courts, no matter how strong the connection with the sanctuary state or parent organization. In the Eichmann trial, the district court rejected the defense, noting that a state that plans and implements a "Final Solution" cannot be treated as *par in parem*, but only as a "gang of criminals."[29] The court noted that the doctrine had been repudiated with respect to international crimes in the judgment of the Nuremberg Tribunal and that this position had been adopted by the United Nations and by the Convention for the Prevention and Punishment of Genocide.[30] The Israeli Supreme Court held that acts contrary to the law of nations are "completely outside the 'sovereign' jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them...."[31]

It is very likely any U.S. or other responsible criminal court will respond in a like manner to any act of state defense which a terrorist defendant puts forward. There seems virtually no way in which terrorism can be justified as "legitimate" when it has been so widely condemned by responsible nations and now by the United Nations itself in the recent series of General Assembly and Security Council resolutions.

Superior Orders

A second possible terrorist defense, also employed in the Eichmann trial, is that the accused acted pursuant to superior orders. Arguing for Eichmann, defense counsel Servatius asserted:

> Everything he did was inspired by the highest authorities, who enforced obedience by holding him to his oath. Had Eichmann refused to obey, at great personal cost, others would have carried out the task in any case, and his sacrifice would have been in vain.[32]

The Jerusalem District Court ruled that "all civilized countries" had rejected the superior orders defense as an exemption from criminal responsibility.[33] The court further noted that its position was acknowledged by the United Nations and that even jurists of the Third Reich "did not dare set down on paper that obedience to orders is above all else."[34] Finally, the court noted there is "no principle recognizing such a defense crystallized in international law."[35] The Nuremberg Tribunal considered an accused's acting pursuant to superior orders to be a matter of mitigation of punishment, not as an absolute defense.

It is unlikely Western courts will grant any more favorable recognition to this generally discredited defense. Since extraterritorial apprehension as a counterterrorism measure is most likely to be reserved for leadership and operational elites, it may prove difficult for defendants to establish that they were acting under orders other than of their own design. Even if defendants are acting under the orders of others, they would be required to establish duress. U.S. law would impose a heavy burden upon the defendant to show that he or she had no opportunity to escape from the control of superiors prior to the commission of the criminal conduct. In the unlikely event such duress could be established, like the Israeli court, U.S. courts will treat such fact as a matter of extenuation and mitigation in assessing punishment and not as an absolute criminal defense, particularly in cases where deadly force or serious bodily injury is the object of the offense.

Inability to Receive a Fair Trial

The most difficult defense for the Government to overcome will be claims that the accused terrorist cannot receive a fair and impartial trial in the prosecuting forum state. The defense will point to pretrial publicity, suggestions that the true gravamen of the indictment is an offense against the prosecuting nation state itself, and the fact an alien defendant is being judged not by a tribunal or jury of his peers, but instead by persons of a totally different national and cultural background. If the defendant is not fluent in English or the language employed by the prosecuting forum state's courts, objections will be raised as to his capacity to even understand the nature of the proceedings themselves, much less the concept of the judicial system. Finally, the defense can be expected to allege that the defendant, as an alien, could not have been on notice as to his obligations under the forum state's laws.

Each of these arguments is of sufficient import to merit a careful and detailed prosecution response. However, examining the line of cases in support of the Ker-Frisbie doctrine, several of which involved the prosecution of foreign nationals in U.S. courts, there is no reason to believe that a fair and impartial trial cannot be afforded alien defendants. United States ex rel. Lujan v. Gengler,[36] United States v. Quesada,[37] and United States v. Herrera,[38] all involved acts of irregular rendition to bring foreign nationals before U.S. courts. Each of the cases resulted in a conviction which was affirmed on appeal. No case in the Ker-Frisbie line of decisions has overturned a conviction of an alien by reason of the defendant's inability to receive a fair trial in a U.S. court.

To be sure, extraordinary measures will have to be undertaken to ensure fair trial rights for an apprehended international terrorist. Media coverage of the trial should remain under strict judicial scrutiny. In the event the victims of the alleged terrorist's acts reside in the district to which the terrorist is first brought, a change of venue may be appropriate. Prosecutors and the court will have to ensure that defendants not fluent in the national language are provided a competent interpreter at all points prior to and during investigatory and trial proceedings. The court may wish to permit foreign national legal counsel to join the defense team. Jury selection through the voir dire process will have to be expertly handled by the prosecution which will be under a particularly heavy burden in the face of an uncooperative defense, to ensure the selection of impartial fact finders. Publicity surrounding the trial itself may very well require the jury be sequestered during the course of proceedings.

These and other extraordinary measures will have to be considered to ensure accused terrorists are afforded, and are perceived by the world community to be receiving, a fair and impartial trial. But assuming U.S. or other forum state authorities are prepared to carefully prepare and bear the considerable expense of such proceeding, there is every reason to believe the trial can comport with constitutional and court established fair trial guarantees.

Countervailing Actions by Terrorists and Sanctuary States

Once the fact of an extraterritorial apprehension becomes public knowledge, the United States or other prosecuting forum state, including any state known to have provided direct support to the mission, will be under a substantially increased threat of countervailing action. Such action may be perpetrated by sympathetic terrorists or by the sanctuary state in which the defendant was apprehended. Experience demonstrates that terrorists are apt to respond to pro-active counterterrorist actions with escalated violence and "reprisal." In the aftermath of the April 14, 1986 U.S. air strikes in Tripoli and Benghazi, "reprisals" were conducted against targets associated with both the United States and Great Britain.[39]

Countervailing action may come in the form of random acts of violence against prosecuting state installations or nationals located in vulnerable overseas areas. One particularly likely scenario would be the kidnapping of prosecuting forum state nationals in "retaliation" for the extraterritorial apprehension. Kidnap victims would undoubtedly be held ransom for the unconditional release of the apprehended terrorist. Since it is stated U.S. national policy not to negotiate with or make concessions to terrorists, the U.S. Government would have to be prepaed to hold firm, even in the face of a significant number of American nationals being held . ransom for a limited number of terrorist defendants in a proposed "prisoner exchange." Alternatively, allied nationals could be kidnapped in the hopes of bringing political and diplomatic pressure to bear or for the purpose of driving a wedge between the prosecuting forum state and its allies. Either countervailing action would be designed to bring political pressure to bear while simultaneously demonstrating the impotence of the prosecuting forum state to respond under the circumstances.

Another potential countervailing action would be a direct attack upon the court proceedings themselves. One federal prosecutor involved in counterterrorist investigations indicated that the trial of an apprehended terrorist will all but result in "drawing concentric circles around the U.S. courthouse where the proceedings will be conducted."[40] Extraordinary physical security measures will be required to protect Government facilities, e.g., the courthouse, prosecutor's offices, lockup, etc. Even more important, measures will have to be in place to provide credible protection for all personnel involved in any way with the proceedings, e.g., the judge and his staff, jury, prosecutors, witnesses, and very possibly members of their families. Moreover, the personal inconvenience of such security measures to those being protected and the substantial expense to the government are two additional "costs" to be considered in evaluating the merits of bringing an international terrorist to the United States or any friendly forum state for prosecution.

Another factor to be considered is the possibility of other states asserting their right of extraterritorial apprehension against the United States and its allies. Under the principle of reciprocity recognized in international law, if the United States or another state asserts its right to extraterritorial apprehension, there must be a willingness to acknowledge such right is available to other states as well. How would the United States respond, for example, if the Soviet Union or Nicaragua engaged in the "extraterritorial apprehension" of a Contra guerrilla leader present in the United States? In light of the principle of reciprocity, it is essential the United States define extraterritorial apprehension narrowly and make clear its application is limited to stateless areas and sanctuary states which support or actively condone international terrorism and which refuse to either prosecute or extradite those responsible. The threat posed by the international terrorists to U.S. or allied interests must also be demonstrated in unmistakable terms in explaining the action.

These and other countervailing responses are significant costs which may be experienced following an extraterritorial apprehension. Since they are significant, the threat they represent to the United States and its allies must be weighed carefully in deciding whether or not to adopt such a counterterrorism measure. In the event the proposed measure is adopted, these costs would generally militate in favor of applying this option only when the terrorists to be apprehended represent significant elements in the structure of international terrorism. In considering countervailing costs, decision-makers and planners must compare the costs of this measure with other counterterrorism options including the option to do nothing at all. On balance, extraterritorial apprehension may well prove less costly as compared with options entailing greater force or the decision to do nothing and endure the terrorist violence.

Liability of the Apprehending State and its Agents

Foreign Criminal Liability of Apprehending Agents

Certain forms of legal liability may arise in the aftermath of an extraterritorial apprehension and must be weighed along with other considerations. In the event the apprehending personnel experience resistance in the sanctuary state or stateless area and any of their number are captured, they could be subjected to local criminal prosecution. Assuming such captured personnel are not summarily killed by local forces, they may be charged by the sanctuary state or "authorities" in the stateless area with violations of municipal criminal law. Such charges might be expected to include kidnapping, spying, criminal trespass, criminal assault, and attempted murder. In light of the circumstances, it is clear the United States or any other apprehending state would have neither political nor legal leverage to effect the release of these personnel. The captured personnel would in all probability be exploited in a propaganda campaign not unlike some of the displays endured by the United States when its pilots were captured by the North Vietnamese during the Vietnam War.

Little can be done about this contingency other than to recognize that steps must be taken during the planning process to minimize the possibility of capture. Ways and means of ensuring that such personnel can be fully supported by necessary force and "exfiltrated" under all foreseeable circumstances must be incorporated into any apprehension plan.

Claims and Civil Action Against the Apprehending State

Another possible area of legal liability which must be considered is civil liability in the form of an administrative claim or suit for damages brought against the apprehending state. Any administrative claim or civil action brought against the U.S. Government will have to overcome the doctrine of sovereign immunity which generally bars civil actions against the Government except where it has expressly granted its consent to be sued.[41] The Congress has adopted a number of claims acts which waive U.S. sovereign immunity under specified circumstances. Claims acts which may have some potential for use by apprehended terrorists against the U.S. Government include the Federal Tort Claims Act (FTCA),[42] the Foreign Claims Act (FCA),[43] and the Military Claims Act (MCA),[44] While the chances for a terrorist prevailing under any of these acts is remote, the potential for such action against the U.S. Government must still be evaluated.

Adopted in 1946, the FTCA provides a broad waiver of sovereign immunity that makes the United States liable for injuries caused by

> The negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[45]

At the outset, the apprehended terrorist seeking to file a claim or bring a civil action upon denial of a claim will have to meet the burden of establishing that he was injured, his property damaged, or his Constitutional rights were in some manner violated by the actions of the U.S. Government personnel. To do this, the terrorist "claimant" would have to establish both the Government's "duty" to him and a causal connection between the Government's failure to perform that duty and his injuries. In the case of an alleged violation of his Constitutional rights, the terrorist would have to clearly establish that due process rights or some other Constitutionally protected interest was violated by the acts or omissions of the apprehending personnel. As noted, the Ker-Frisbie line of decisions suggests this burden may be almost impossible for the apprehended defendant to meet.

The FTCA enumerates a series of claims which are not within the scope of liability under the Act, one or more of which will probably always apply in cases of extraterritorial apprehension.[46] First, the Act precludes payment for any claim based upon an act or omission of an employee of the Government exercising due care in the execution of a statute or regulation whether or not such statute or regulation is valid. Under a reasonable application of this provision, even if a court determined extraterritorial apprehension improper as a matter of law, if the employee exercised due care in carrying out his or her assigned duties, no liability would arise.

The Act also precludes any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, and various other intentional torts, except where such wrongs arise from the acts or omissions of investigative or law enforcement officers.[47] For the purpose of this provision, "investigative or law enforcement officer," means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. In the event military or even CIA personnel are used in the actual apprehension, they may or may not fall within this definition of "investigative or law enforcement officers." If they are not so defined, their actions, even if otherwise tortious, come under this enumerated category of claims not payable under the FTCA.

The FTCA also excludes "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." There is at least some potential that a court could construe the circumstances surrounding an armed intervention into a sanctuary state or stateless area as tantamount to an "act of war" and therefore subject to this exception. Notwithstanding all else, the FTCA provision which precludes payment of any claim arising in a foreign country will normally serve to protect the Government. Since it is likely that the basis of the terrorists' allegations will be acts or omissions arising in a foreign sanctuary state or stateless area, this provision will almost invariably preclude recovery under the FTCA even if the tort can be established.

The Foreign Claims Act (FCA)[48] constitutes an alternative mechanism under which the apprehended terrorist may attempt to gain recovery against the U.S. Government for alleged "wrongs" arising out of his seizure. The FCA allows claims for personal injury to, or death of, any inhabitant of a foreign country or damage to, or loss of, real or personal property of a foreign country occurring outside the United States and caused by its (U.S.) military forces or individual members or otherwise incident to non-combat activities of such forces. The purpose of the FCA would seem to exclude the terrorist or even those sustaining collateral injury or damage in the sanctuary state of stateless area from the category of eligible claimants. The stated purpose of the Act is "to promote and maintain friendly relations" in foreign countries "through the prompt settlement of meritorious claims.[49] Certainly a Presidentially authorized extraterritorial apprehension in a stateless area or sanctuary state identified with supporting or actively condoning international terrorism is well beyond this waiver of immunity intended by the Congress in enacting the FCA.

Nevertheless, the FCA provides some specific provisions which may well serve to absolutely preclude recovery. Claims for damage to, or loss or destruction of property, or for personal injury or death resulting from action by the enemy, or resulting directly or indirectly from any act by armed forces engaged in combat are not payable under the FCA. In general, claims which are payable are those related to noncombat activities. If

U.S. Armed Forces are involved in an extraterritorial apprehension in a stateless area or sanctuary state, it would be most difficult to categorize the operation as "noncombatant" and the terrorists or sanctuary state forces as anything but "the enemy."[50]

The Military Claims Act (MCA)[51] provides statutory authorization to pay claims against the U.S. Armed Forces for damage to or loss or destruction of real or personal property, or for personal injury or death, either caused by military personnel or civilian employees while acting within the scope of their employment or otherwise incident to noncombat activities. Unlike the FTCA, there are no geographical limits on claims under this Act. However, the Act provides no right to sue and claimants are limited to filing administrative claims for adjudication.

The MCA does not authorize the payment of claims resulting from action by the enemy, or resulting directly or indirectly from any act by armed forces engaged in combat. It also excludes claims from any inhabitant of a foreign country who is a national of a country at war with the United States or of any ally of such an enemy country, unless it is determined that the claimant is friendly to the United States. The first of these bars to recovery, if not the second, would appear to preclude any international terrorist from gaining successful adjudication on any claim against the U.S. Armed Forces involved in an extraterritorial apprehension.

Civil Action Against Individual Government Personnel

In most cases, Government personnel whose conduct gives rise to a civil action against the United States are immune from suit brought against them personally. In the case of the FTCA, immunity arises from case law and the immunity must be pleaded and proved.[52] But in instances where the doctrine of sovereign immunity effectively bars action against the Government, the apprehended terrorist may attempt to bring a personal action against one or more Government personnel who directed, planned, or executed the seizure. As in the case of a claim or action against the Government, an action against an individual employee of the Government will have to allege an appropriate legal cause of action, most likely one based on an intentional tort theory or a violation of the terrorist defendant's Constitutional rights.

Assuming that the extraterritorial apprehension is executed with particular attention to the standards established in Toscanino and subsequent cases under the evolving Ker-Frisbie doctrine, it is highly unlikely that an apprehended terrorist would prevail in such harassing litigation against U.S. Government agents or personnel in their own individual capacity. Nevertheless, civil action against those directing, planning, and executing the apprehension remains a possibility and must be considered in assessing the overall merits of this counterterrorism measure.

The court in United States v. Reed[53] in determining that the defendant's seizure pursuant to an arrest issued with probable cause was "reasonable" for purposes of the Fourth Amendment, commented:

> As for the manner of the seizure, custody obtained by executing an arrest warrant is not invalidated because of the use of excessive force, even though the defendant might have a suit for damages against the government agents involved. (emphasis added)[54]

In DiLorenzo v. United States,[55] a DEA agent arranged for the arrest of the defendant in Panama. Panamanian authorities subsequently were alleged to have tortured the defendant, although their actions were never imputed to the DEA. The court noted in its opinion that the DEA's direct role in the "abduction" from Panama to the United States could subject the individual agents to suit.

Actions brought against government personnel in their own individual capacity for alleged violations of the defendant's Constitutional rights are likely to be based upon the "Bivens Doctrine" which resulted from the case of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.[56] Bivens held that a federal agent who had violated the command of the Fourth Amendment could be held liable in damages despite the absence of a federal statute authorizing such a remedy.[57] The Bivens decision represented a bold judicial initiative to fabricate a remedy based on the Constitution. The Court in Bivens effectively sidestepped the doctrine of sovereign immunity in crafting a remedy for the plaintiff. The Bivens doctrine stands for the proposition that Constitutional rights have a self-executing force that not only permits, but requires, the courts to recognize remedies appropriate for their vindication.[58]

The doctrine has now been extended in Carlson v. Green[59] and Davis v. Passman[60] to violations of the Fifth and Eighth Amendments. In Carlson, the U.S. Supreme Court found a cause of action in damages against federal prison officials under the Eighth Amendment even though the plaintiff could have recovered damages under the FTCA directly from the Federal Government.[61] In Davis, the Court held that a woman discharged from her job as a congressional aide because of her gender could sue the congressman for damages under the Fifth Amendment.

In the event U.S. Government personnel are sued in their individual capacity, there is no automatic right of indemnification in the absence of a statute. Congress has chosen to provide for indemnification of federal employees in only a narrow category of cases, none of which cover the types of activities apt to be related to extraterritorial apprehensions.[62] While paying judgments for federal officials in such actions has been ruled by the Department of Justice to be an unauthorized expenditure of funds, legal representation is generally provided in litigation which challenges the propriety of the employee's authorized conduct.[63]

In practice, the Bivens doctrine has only been applied successfully against U.S. Government employees in a very limited number of cases. A study completed in early 1982 indicated that out of over 2,200 Bivens actions filed in district courts against federal officers, only 12 suits had resulted inactual damage awards.[64] While the doctrine has been expanded to cover additional amendments, the Supreme Court in two 1982 decisions imposed a greater evidentiary burden upon plaintiffs bringing actions against high Government officials. In Nixon v. Fitzgerald,[65] the Supreme Court held that the President, because of his unique position in the Constitutional scheme, is entitled to absolute immunity for official acts. In Harlow v. Fitzgerald,[66] the Court lowered a presidential aide's burden of establishing a good faith defense to liability for discretionary functions. The Court ruled that an official no longer has to establish both "subjective" and "objective" good faith as had been previously required. Government officials need only show "the objective reasonableness" of their conduct under the new Harlow rule.[67]

While there is little to prevent an apprehended terrorist from bringing civil action against the Government or its agents, the prospects for recovery are remote unless the seizure involves brutality or force far in excess of what is reasonably required under the circumstances. As long as the apprehension is carried out using such force as may be necessary to establish and maintain positive control over the defendant and the immediate area in which he or she is located, it is likely the apprehended terrorist will be without a valid claim or cause of action. Detailed planning, the development of appropriate rules of engagement based upon individual self-defense, and sufficient training in advance of execution should effectively preclude any real chance of civil recovery against either the Government or its agents arising out of an extraterritorial apprehension of international terrorists.

CHAPTER VI

DECISION-MAKING, PLANNING, AND EXECUTION

> I believe we have to structure some new international remedies to be built on existing precedents, and if we articulate these remedies properly...if we carry them out properly...we can establish a rule of law which will be recognized and sanctioned and upheld by world public opinion. 1
>
> Senator Arlen Spector
> July 30, 1985

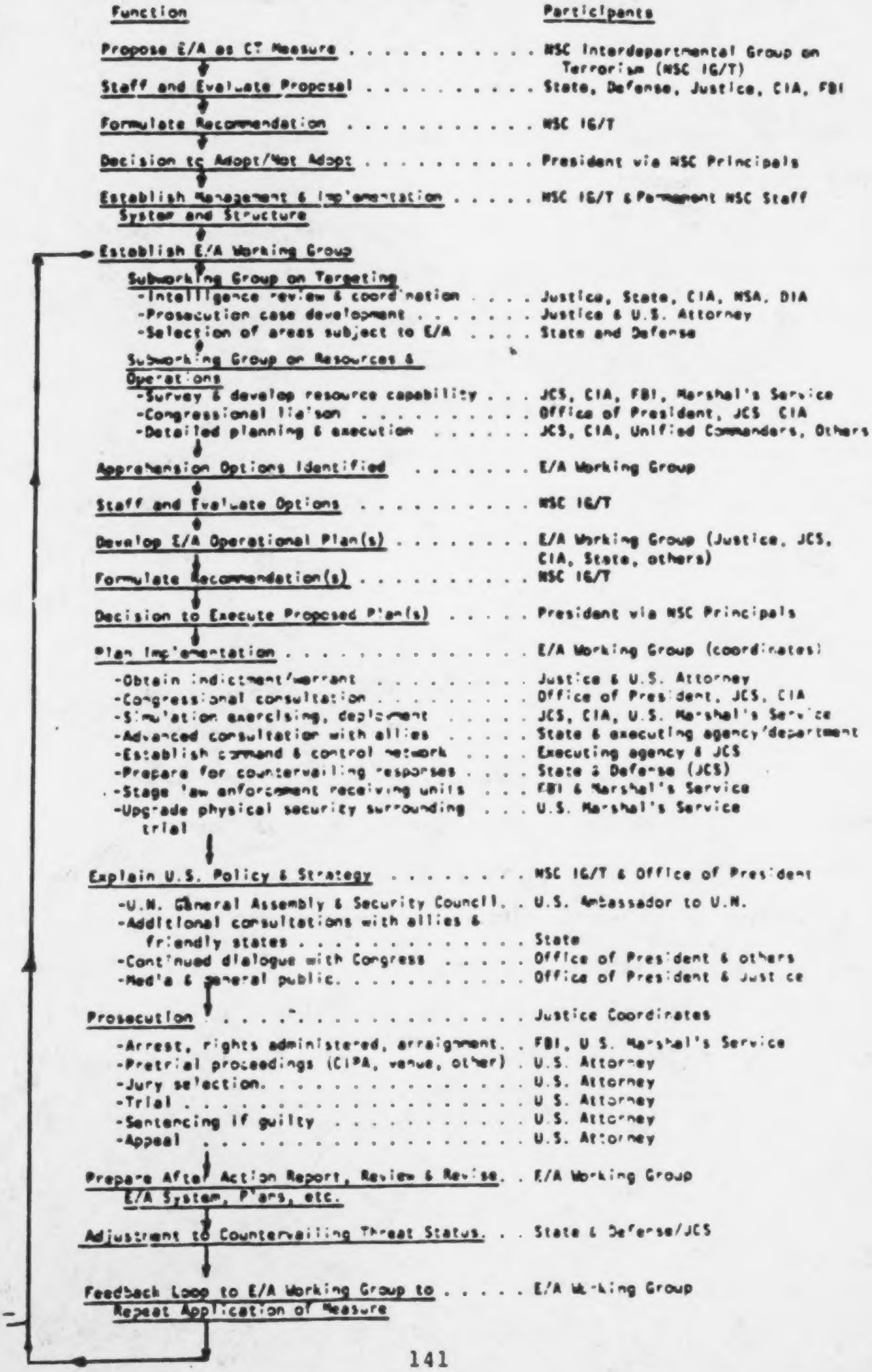
If extraterritorial apprehension is adopted as a counterterrorism measure, its success will greatly depend upon the development of an effective system of decision-making, planning, and execution. With an understanding of the principal legal, policy, and operational considerations which will play a role in this pro-active counterterrorism measure, it remains to identify the key participants and describe the functions they must perform in this system.

A System for Decision-Making, Planning, and Execution

Implementation of extraterritorial apprehension can be best understood in terms of the chronological steps which will have to be undertaken by decision-makers, planners, and operational personnel. Figure 1 provides a diagram of a chronologically based decision-making, planning, and execution system applicable to extraterritorial apprehension as a U.S. Government counterterrorism measure. The diagram depicts the principal steps in decision-making and planning in terms of the sequence of tasks to be performed. The diagram also identifies those government departments or agencies most likely to have cognizance or serve as active participants in the various phases of the system. The system proposed in this diagram

FIGURE 1

EXTRATERRITORIAL APPREHENSION DECISION-MAKING AND PLANNING DIAGRAM



Function	Participants
Propose E/A as CT Measure	NSC Interdepartmental Group on Terrorism (NSC IG/T)
Staff and Evaluate Proposal	State, Defense, Justice, CIA, FBI
Formulate Recommendation	NSC IG/T
Decision to Adopt/Not Adopt	President via NSC Principals
Establish Management & Implementation System and Structure	NSC IG/T & Permanent NSC Staff
Establish E/A Working Group	
Subworking Group on Targeting	
-Intelligence review & coordination	Justice, State, CIA, NSA, DIA
-Prosecution case development	Justice & U.S. Attorney
-Selection of areas subject to E/A	State and Defense
Subworking Group on Resources & Operations	
-Survey & develop resource capability	JCS, CIA, FBI, Marshal's Service
-Congressional liaison	Office of President, JCS CIA
-Detailed planning & execution	JCS, CIA, Unified Commanders, Others
Apprehension Options Identified	E/A Working Group
Staff and Evaluate Options	NSC IG/T
Develop E/A Operational Plan(s)	E/A Working Group (Justice, JCS, CIA, State, others)
Formulate Recommendation(s)	NSC IG/T
Decision to Execute Proposed Plan(s)	President via NSC Principals
Plan Implementation	E/A Working Group (coordinates)
-Obtain indictment/warrant	Justice & U.S. Attorney
-Congressional consultation	Office of President, JCS, CIA
-Simulation exercising, deployment	JCS, CIA, U.S. Marshal's Service
-Advanced consultation with allies	State & executing agency/department
-Establish command & control network	Executing agency & JCS
-Prepare for countervailing responses	State & Defense (JCS)
-Stage law enforcement receiving units	FBI & Marshal's Service
-Upgrade physical security surrounding trial	U.S. Marshal's Service
Explain U.S. Policy & Strategy	NSC IG/T & Office of President
-U.N. General Assembly & Security Council	U.S. Ambassador to U.N.
-Additional consultations with allies & friendly states	State
-Continued dialogue with Congress	Office of President & others
-Media & general public	Office of President & Justice
Prosecution	Justice Coordinates
-Arrest, rights administered, arraignment	FBI, U.S. Marshal's Service
-Pretrial proceedings (CIPA, venue, other)	U.S. Attorney
-Jury selection	U.S. Attorney
-Trial	U.S. Attorney
-Sentencing if guilty	U.S. Attorney
-Appeal	U.S. Attorney
Prepare After Action Report, Review & Revise E/A System, Plans, etc.	E/A Working Group
Adjustment to Countervailing Threat Status	State & Defense/JCS
Feedback Loop to E/A Working Group to Repeat Application of Measure	E/A Working Group

generally conforms to the existing U.S. Government counterterrorism decisional and planning structures. Although changes could result from Congressional action; e.g., creation of a "czar" or cabinet level official whose sole responsibility it would be to manage U.S. Government counterterrorism policy; the proposed system incorporates both the principal participants and functions required to develop, plan, and execute this counterterrorism measure.

The initial steps to be undertaken would be the principal responsibility of elements of the President's National Security Council (NSC) staff. As a result of recommendations made by the Vice President's Task Force on Combatting Terrorism in December of 1985, permanent staff elements have been established within the NSC to manage and coordinate counterterrorism policy and strategy on a full-time basis. Previously, this function was accomplished through NSC general staff elements supporting three organizational units subordinate to the Council itself: the Senior Interdepartmental Group, the Interdepartmental Group on Terrorism (IG/T), and the Advisory Group on Terrorism.[2]

While counterterrorism and antiterrorism policy and strategy have been the principal responsibility of the NSC IG/T, this coordinating group comprised of relatively senior representatives of cognizant government departments has not operated on a full-time or continuous basis. The permanent NSC staff organization now provides the needed continuity. In all probability, this element would be an important point of coordination for decision-making, planning, and execution of the extraterritorial apprehension measure. The NSC counterterrorism staff element would presumably report to, and receive coordinating instructions from, the NSC IG/T, the

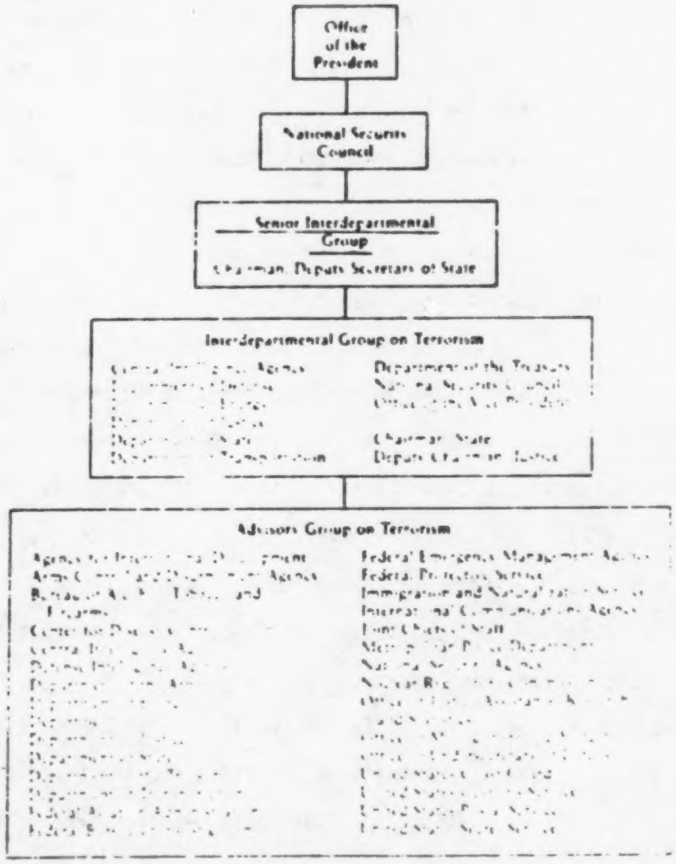
President's Special Assistant for National Security Affairs, and the Vice President, who, within the Reagan Administration, has substantial responsibility for overseeing Executive Branch policy on counterterrorism. Figure 2 provides a diagramatic depiction of the overall U.S. Government structure for antiterrorism, planning, coordination, and policy formation.

A proposal to adopt extraterritorial apprehension as a pro-active counterterrorism measure would be staffed through the NSC IG/T to at least those departments and agencies most apt to have an organizational role or interest. Although the total composition of the IG/T is somewhat larger, it is likely that staffing would entail review by, and clearance from, the Office of the Vice President, the NSC staff itself, the CIA, and the Departments of Defense, Justice, and State. Within the Department of State, particularly close examination of the proposal would be required by the Office of the Legal Adviser, the Office of the Ambassador-at-Large for Counterterrorism, the Bureau of Diplomatic Security, and the Bureau of Intelligence and Research. Within the Department of Defense (DOD), the proposal should be considered by the Office of General Counsel for the Secretary of Defense, the Joint Chiefs of Staff (JCS), the Deputy Assistant Secretary of Defense for Counterterrorism, the Defense Intelligence Agency (DIA), and the National Security Agency (NSA). At minimum, key operational personnel and legal counsel providing support to these organizations and officials should review and comment on the proposal.

Department of Justice (DOJ) staffing would most likely include the Assistant Attorney General for the Criminal Division, the Director of the Federal Bureau of Investigation (FBI), and possibly the Director of the U.S. Marshal's Service. Staffing within the CIA should include both the

FIGURE 2

U.S. Government Organization for Antiterrorism, Planning, Coordination and Policy Formulation


Office of the President
National Security Council
Senior Interdepartmental Group
Chairman, Deputy Secretary of State
Interdepartmental Group on Terrorism
Central Intelligence Agency
Department of Defense
Department of Energy
Department of Justice
Department of State
Department of Transportation
Department of the Treasury
National Security Council
Office of the Vice President
Chairman: State
Deputy Chairman: Justice
Advisory Group on Terrorism
Agency for International Development
Arms Control and Disarmament Agency
Bureau of Alcohol, Tobacco, and Firearms
Center for Disease Control
Federal Emergency Management Agency
Federal Protective Service
Immigration and Naturalization Service
International Communication Agency
Joint Chiefs of Staff
Metropolitan Police Department
National Security Agency
United States Coast Guard
United States Postal Service
United States Secret Service

[illegible] State, August 1982, p. [illegible]

Office of General Counsel and appropriate planning, research, and operational divisions having responsibility for counterterrorism matters. During this staffing of the concept throughout the agencies and departments, it may be appropriate to apply the E.O. 12333 executive branch intelligence oversight review process to confirm the legal, policy, and operational reliability of the concept.

With comments and recommendations received from cognizant IG/T representatives, the NSC staff may find it necessary to revise the proposal and present it through the Senior Interdepartmental Group to the NSC principals for presentation to the Office of the President. The proposal might go forward as a Presidential Decision Memorandum accompanied by a draft Presidential Directive. If the President elects to adopt this option as a pro-active measure available to the United States, the directive would presumably provide broad guidelines to the NSC IG/T to commence formal planning, coordination, and preparation for execution of extraterritorial apprehensions. The strategy option as envisioned, would require the President or a very senior executive branch official with a specific delegation of authority from the President to review and approve individual proposals for extraterritorial apprehension of international terrorists.

The Presidential directive should authorize the creation of a unit which might be entitled the "Extraterritorial Apprehensioin Working Group (EAWG) to be added to those working groups already functioning in support of the NSC IG/T. The EAWG would consist of experienced personnel from the NSC staff, CIA, and the Departments of Defense, Justice and State. As noted in Figure 1, at minimum, cognizant agencies and departments should include working-level representatives from key offices and divisions who would directly participate in the development, planning, decision-making, and coordination of this measure. To be effective, the working group should be comprised of representatives who have the needed professional and technical expertise to actively contribute in this intense inter-agency process.

The EAWG would function to establish an effective mechanism for comprehensive intelligence review to assist in targeting terrorists to be apprehended. This specific function might be best accomplished by a sub-working group on targeting which would serve to bring prosecutors and the representatives of the intelligence community together on a routine basis to evaluate intelligence information, necessary case formulation requirements, and related matters. A principal objective of developing such a sub-working group would be to develop mutual understanding and trust between the law enforcement and intelligence communities.

The EAWG would also be tasked with coordinating and developing the required operational personnel and resource capability needed to eventually execute an apprehension plan. To address this and other issues, a second sub-working group on operations and resources should be established. This sub-working group would be composed of representatives from those departments and agencies which could play a principal role in the apprehension itself, e.g., the Departments of Defense, State, and Justice, and the CIA. This sub-working level group should review available personnel and equipment resources, analyze what may be needed in various probable apprehension scenarios, and direct materiel acquisition and force or unit training as needed. This same group would have substantial responsibility for assisting in the eventual selection of the agency or department to be charged with executing a particular apprehension recommended by the targeting sub-working group.

The overall functions of the EAWG would be to manage and coordinate the entire governmental process related to extraterritorial apprehension. Once one or more terrorist leadership or operational elites had been identified by the targeting sub-working group and the operations and resources sub-working group determined the necessary capability was in place, the EAWG would prioritize target options and submit a proposal to the NSC IG/T for review. The proposal would provide a broad outline of the means by which the apprehension would be accomplished. If the IG/T considered that department or agency staffing would be appropriate at this point, its members would refer the proposal on an expedited basis to their respective organizations for comment and recommendations. As soon as feasible, the IG/T would reach a decision regarding whether to recommend adoption of any of the proposed options.

For any options approved by the IG/T, the working group could proceed to develop a detailed operational plan. Planners would engage in an iterative process with one another and their constituent departments or agencies to ensure that necessary interests and considerations regarding policy, law, operational, and political concerns are taken into account. At this juncture, it may be advisable for the State Department to consult in confidence with its country team if one exists for the sanctuary state or stateless area while the JCS enters into a dialogue with the unified commander for the geographical area where the apprehension is to occur. The completed and fully staffed plan would be provided to each of the principal departments or agencies for approval and comment before being forwarded to the NSC IG/T for final consideration. Obviously, this staffing can be more centrally accomplished in the interest of increasing operational securty, although by so doing, there is some risk that important interests and concerns will not be exposed and addressed.

NSC IG/T approved plans would go forward to the NSC itself and ultimately to the President for a decision to approve or disapprove one or more apprehension options. The Presidential decision would be implemented by the NSC staff organization authorizing appropriate offices, agencies, and departments to proceed with the execution phase on a coordinated basis. The functions identified in Figure 1 are not intended to represent an exhaustive listing of tasks that would have to be accomplished immediately prior to and during the execution of the apprehension. However, during this phase, it would be necessary for the Department of Justice to perfect its case to the extent possible and to have obtained the necessary indictments or arrest warants if prosecutors had not already done so.

The department or agency selected to execute the actual apprehension would perform scenario specific exercising attempting to simulate the apprehension and expected conditions at the apprehension site to the extent possible. When the apprehension unit or force was determined to be operationally ready, it would be deployed in preparation for entry into the sanctuary state or stateless area. The NSC would undertake to complete the necessary Congressional liaison, pursuant to the War Powers Resloution, the Intelligence Oversight Act of 1980, or some alternative mechanism, depending upon the particulars of the apprehension scenario and the forces involved. The Department of State would be tasked with accomplishing limited consultations with principal Western allies. In the event specific foreign support was needed to assist in the apprehension operation, the responsible agency or department and the Department of State would negotiate the detailed arrangements. Press guidance should be coordinated between the Office of the President, the Department of State, and the Department of Justice. Since the operational details of the extraterritorial apprehension should remain classified, the agency or department charged with execution should not have the responsibility for discussing its actions with the media.

The actual execution of the apprehension would in most cases be managed by existing command and control structures for the departments or agencies involved. During at least the actual execution phase, there should be active participation by the appropriate JCS unified military commander for the geographical region as well as the cognizant country team if one exists. As the apprehension occurs and is publicly reported, U.S. Government departments, particularly Defense and State, with major overseas interests should direct their personnel and facilities to increase physical security readiness in anticipation of possible countervailing action from sympathetic terrorists and sanctuary states or their allies. Under some circumstances, it may be necessary to provide travel advisories or discuss the increased threat with private U.S. and allied interests operating in high risk areas. The nature and scope of the threat would continue to be monitored up to and after the terrorist trial if appropriate.

Finally, the Department of State and the U.S. Ambassador to the United Nations would have the substantial responsibility of explaining U.S. actions to the world community at large. These actions should be explained not only in terms of the justification for proceeding under international law, but in terms of overall U.S. counterterrorism policy. Particular emphasis should be placed on the narrow application of the extraterritorial apprehension option, the fact it was used in the absence of any evidence that the sanctuary state or stateless area would either prosecute or extradite, and that the apprehended terrorist leadership or operational elites were considered a serious, continuing and imminent threat to the vital interests of the United States, its institutions both public and private, and its nationals. The world community, and in particular the terrorist sanctuary states, should be made to clearly understand that the United States or some other apprehending state is prepared to repeat the use of this pro-active measure in other appropriate cases. The message should be to extradite, prosecute in good faith, or be prepared to have nations threatened do it for you.

Decision-Making Criteria

Adoption as a Pro-Active Measure

The many and often conflicting interests involved in developing counterterrorism policy make governmental decision-making in this area extraordinarily difficult. As in any other area of governmental decision-making, counterterrorist actions must be closely examined for not only their benefits, but also their costs. A cost-benefit analysis, if it is to be meaningful, must be compared against similar analyses for other potential counterterrorist measures, as well as the decision to take no action and simply endure some level of terrorist violence. The decision to undertake pro-active measures as part of U.S. counterterrorism policy was adopted April 3, 1984 as part of National Security Decision Directive

(NSDD) 138.[3] NSDD 138 is reported to have directed 26 government agencies and offices to provide the President with options on how to implement a new policy of pro-active measures designed to build "an active defense against terrorism."[4]

The fact that overt military action was not taken against state-supported terrorism until nearly two years after adoption of NSDD 138 is perhaps the best evidence of how difficult decision-making is with regard to pro-active counterterrorism measures. Notwithstanding the reportedly tough stance of NSDD 138, the U.S. Government has proceeded with care in developing counterterrorism policy and strategy, carefully weighing the costs as well as the benefits of particular options. Unfortunately, the result of this deliberative process is a high level of public and even Congressional frustration that too little is being done, too late.[5]

The difficulties inherent in the counterterrorism decision-making process were addressed in the Vice President's Task Force on Combatting Terrorism.[6] Recommendation Number 5 of the final report included sample criteria for developing response options:

Adequacy of information
Reliability of intelligence
Status of forces for preemption
Ability to identify the target
Host country cooperation or opposition
International cooperation
Legality in both domestic and international terms
Risk analysis: What is acceptable risk?
Probability of success (including definition of "success")
Proportionality of forces and damage to the terrorist act
Political reaction of allies
U.S. public attitude
Probable media reaction
Potential for collateral injury to those other than the terrorists
Conformance with national standards of morality and ethics
Timeliness of the response[7]

These criteria, while not necessarily exhaustive, should prove useful in examining and comparing extraterritorial apprehension as a counterterrorism measure. This study provides an analysis of many of these very considerations. Recommendation 5 of the Task Force Report charges the NSC IG/T to prepare a "realistic set of criteria within which the key decisions on the use of force in preemption, reaction, and retaliation can be formulated." Until final criteria are adopted, these sample criteria should prove useful in evaluating the costs and benefits of extraterritorial apprehension as a pro-active counterterrorism measure.

Site Selection and Targeting

The Task Force's sample criteria should also be rigorously applied in the decision-making related to the selection of those countries or areas which are to be made subject to the measure. For purposes of these specific decisions, decision-makers should take a number of additional factors into account. Countries and stateless areas subject to extraterritorial apprehension should be those which clearly demonstrate an inclination to harbor those terrorists who particularly threaten the vital or major interests of the apprehending state. Such countries and areas should be those which show little or no prospect of increasing the level of their cooperation in international counterterrorist initiatives. Prime candidates at the present would be Libya, Iran, Syria, and Lebanon. There may be cases in which the United States has been unable to secure the extradition of defendants it considers international terrorists because the asylum state has honored the political offense exception. However, the erection of this bar to extradition in the absence of a showing that the asylum state is itself supporting or actively condoning the protected terrorist would not justify intervention under the right of extraterritorial apprehension as envisioned in this study. The measure should be reserved for only those countries and areas which have exhibited protracted and continued bad faith in their support for international terrorism.

Since the political as well as resource costs necessary to plan and execute extraterritorial apprehensions may be significant, the selection of those to be apprehended must be done with great care. Some factors which decision-makers and planners may wish to consider in the targeting process include:

Threat to U.S. national security and other U.S. interests
Gravity of the crime(s) commited
Number and nationality of persons victimized
Strength of prosecution case (admissibility, relevance, credibility, utility, and probative value of evidence)
Difficulties in providing terrorists a fair trial while protecting sensitive classified information
Probability of countervailing action
Impact apprehension will have on accused terrorist's organization (i.e., greater cohesion or cause for disorientation within the ranks)
Impact apprehension will have on other terrorist organizations
Impact apprehension will have on sanctuary state or stateless area (stabilizing or destabilizing effect)

These factors when considered with the sample criteria suggested in the Vice President's Task Force Report will generally limit targeting to key leadership and operational elites within international terrorist organizations. The cost attendant to using this measure is sufficiently high that decision-makers and planners will generally wish to apply it for the purpose of striking a meaningful blow designed to eliminate key figures, e.g., Abul Abbas, Abu Nidal, or Carlos. Assuming a prosecution case can be made, extraterritorial apprehension may even prove a means of holding key government leaders in states sponsoring terrorism accountable under the law for their criminal conduct. Obviously, the political reaction to employing extraterritorial apprehension in this manner would have to be evaluated carefully, but such an approach should not be automatically ruled out, particularly when pro-active measures are considered which necessitate the greater use of force or the increased chance of collateral injury or damage to innocent persons.

Principal Operational Concerns

Selection of Apprehension Unit

Legal and policy considereations will play some role in the selection of a department or agency to conduct the actual extraterritorial apprehension. However, the key consideration in selection should be the type of capability required to successfully accomplish the mission at an acceptable cost. As suggested in the discussion of limitations to be considered prior to apprehension in Chapter IV, statutory limitations on CIA and military involvement in law enforcement activities militates strongly in favor of these organizations operating at the express request of the U.S. Attorney General. However, once the target for apprehension and his or her location are clearly identified, the selection of the organization or unit to conduct the apprehension should be driven by the anticipated threat which the terrorist and sanctuary state or stateless area local forces may pose and those means considered most effective in addressing this threat.

One possibility remains the use of either U.S. or foreign national "surrogate" agents to conduct the apprehension. A review of the recent Ker-Frisbie line of cases demonstrates both the advantages and the disadvantages of conducting the apprehension with the use of surrogate agents. While surrogate apprehensions under the auspices of an apprehending state agency may be successful, some of the Ker-Frisbie cases demonstrate the difficulty in ensuring that apprehended persons are properly treated. Toscanino[8] serves as an example of a surrogate apprehension in which proper control was not maintained over foreign agents acting at the behest of the U.S. Government and where the result was the alleged mistreatment of the apprehended person. In Toscanino, the absence of sufficient control over the surrogates directly interfered with the Government's ability to prosecute its case.

In the event surrogate forces or agents are employed, they must be of proven reliability and be thoroughly briefed on the absolute necessity of affording the apprehended defendant reasonable treatment under the circumstances. An apprehended terrorist who is able to persuasively claim that he was brutalized in connection with his apprehension and before being formally placed in the hands of U.S. law enforcement authorities, will embarrass the U.S. Government. Of far greater import, such terrorist defendant may be able to persuade the trial court that it must divest itself of in personam jurisdiction over the case under an application of the Toscanino ruling. Such an occurrence would clearly have an adverse long-term effect on extraterritorial apprehension as a counterterrorism measure.

One of the principal reasons for using surrogates in a covert operation is to ensure that the principal may plausibly deny involvement. In the case of extraterritorial apprehension, plausible denial will generally be irrelevant, at least when the mission is successful. However, if planners consider the use of surrogates is advisable under particular circumstances, the U.S. Government agency best able to train and manage such a unit or force would be the CIA.

In most instances, the preferable plan will be to employ forces or agents of the apprehending state itself. Four organizations within the U.S. Government appear suited to provide this capability: the Department of Defense, the CIA, the FBI, and the U.S. Marshal's Service. The central problem with the FBI being tasked to conduct the actual in-country apprehension is the necessity for it to maintain its relatively unblemished reputation as a law enforcement organization which operates within overt, formal channels.[9] The Bureau's jurisdiction has expanded with the extension of U.S. extraterritorial jurisdiction. However, the FBI's overseas activities are principally investigatory and are carried out with the consent of the host nation. To facilitate investigatory access to foreign nations, it is essential that the FBI foster and maintain a high level of credibility with a substantial number of foreign states. Its active involvement in extraterritorial apprehension may jeopardize the credible image it has developed among foreign law enforcement and judicial authorities.

The CIA and the U.S. Marshal's Service do not operate under the same practical constraints and may be suitable alternatives, particularly if the apprehension is to be accomplished through covert operations or by means of ruse, lure, or trickery. The U.S. Marshal's Service provided direct and effective support in the apprehension of former CIA agent Edwin Wilson who was lured out of Libya in 1981 under false pretenses. Once Wilson crossed U.S. borders and before he was landed, he was apprehended by U.S. Marshals.[10] No matter which of these two organizations might be used, specialized training and support capability would be required. In more complicated and high threat scenarios, it is doubtful if either organization could perform an apprehension without the support of the U.S. Armed Forces.

The Department of Defense has the greatest potential for the near-term development of a working extraterritorial apprehension capability. The threat from the targeted terrorists and the sanctuary state or stateless area forces is likely to prove significant. Since the primary concern during the extraterritorial apprehension itself is the military threat and not the correct application of law enforcement procedures, the direct employment of U.S. military forces will generally prove the desired option. The command and control structure, number of forces, type, deployment, and support should remain a matter within the purview of the Joint Chiefs of Staff, the appropriate unified commanders and the on-scene military commander.

In the event extraterritorial apprehension is approved as a counterterrorism measure for general application and it is anticipated that U.S. military forces would be directly used in conducting the apprehensions, training should be provided to one or more identified DOD units. Included in such training would be the special concerns of the Department of Justice prosecutors that apprehended terrorists be afforded reasonable treatment under the circumstances and that particular attention be directed toward avoiding direct or collateral injury which might give rise to due process objections in a Toscanino defense. Such training might also focus on basic legal requirements related to search and seizure or other investigative functions a military force may be asked to support.

In selecting particular military units to conduct extraterritorial apprehensions, it may be important to realize the unique characteristics of this counterterrorism measure. In extraterritorial apprehension, unlike in other counterterrorism missions, the priority will be placed on apprehension force or unit safety followed by securing effective custody over targeted terrorists. If at all possible, such custody must be secured with minimum force and minimum injury. Securing custody under these circumstances will not always be easy as an operational matter and units or forces would have to be specially trained to perform the mission.

Maintaining Mission Integrity

While an extraterritorial apprehension operational plan would have to reflect law enforcement considerations, mission execution must remain the subject of the tested doctrine and practices of the agency or department tasked. The mission objective will be to conduct the apprehension with no injury to the apprehending agents or force and with minimum collateral injury or damage to the targeted terrorist and surroundings. No legal requirements exist for the apprehending force to concern itself with the details of advising the apprehended terrorist of his or her rights under U.S. or some other apprehending state's law. Once the apprehended terrorist is transferred to a platform or area clearly subject to the apprehending state's exclusive control, qualified law enforcement personnel, supported if necessary by interpreters, may advise him of the circumstances of his apprehension, the general nature of the charges, and that he is under the custody of the apprehending state for law enforcement purposes.

Intelligence interviews of the apprehended terrorist should be avoided until law enforcement agents can be present. The advantage of this procedure is that once the terrorist provides a statement, that which is taken by law enforcement officers would be available and sufficient for defense examination at trial. Under this arrangement, there would be no cause for the defense to later demand a Jencks' Act production of the statement taken by intelligence officers which could be protected from disclosure.[11]

Once the apprehended terrorist is transferred to a secure location, he can be formally arrested by on-scene U.S. Marshals or FBI agents who would then assume custody with such continuing military support as may be required. The apprehended and now arrested terrorist should be expeditiously returned to the United States for immediate arraignment before a U.S. magistrate. Alternatively, if such expeditious transfer is not feasible, a specially designated U.S. military Judge Advocate may be granted temporary magisterial authority and conduct an on-scene arraignment (e.g., if the terrorist is taken to a U.S. Naval vessel and is awaiting onward air transportation to the United States).

Mission planning should also include contingency planning to account for an unforseen emergency or failure. In light of the threat posed to the apprehending unit or force in case of attack or capture by local forces or terrorists, effective contingency planning should provide alternative means of exfiltrating personnel from the area in which the apprehension is staged in the event major complications occur. This facet of the operation more than any other will dictate that strict operational security surround all extraterritorial apprehension missions.

CHAPTER VII

CONCLUSION

> The fight against terrorism through law will take ingenuity, endurance, and money. We must harness the outrage we feel over these acts to give us the strength to carry on the struggle. When you start to tire, I suggest you think about the innocent victims of terror, including Robert Stethem. A passenger on the plane described Stethem's screams as the kind that went on until the very breath went out of his lungs. The thought of those screams will keep me in this fight for as long as it takes to prevail. 1
>
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> July 15, 1985

If Karl von Clausewitz was right, then the Western democracies will only win the war against international terrorism by finding effective means of eliminating those elements which compromise its center of gravity. The challenge for these nations is to devise counterterrorism policies and strategies which destroy this center of gravity in a manner consistent with their fundamental democratic values. One need only recall the unfortunate French experience in Algeria to be reminded of the ill effects of a democratic state which attempts to attain a desired end by means which violate its fundamental political and social values.

This study makes the case that extraterritorial apprehension can be an effective option among those pro-active counterterrorism measures available to the United States and Western allied governments. It is designed to directly attack and undermine the leadership and operational elites as well as the state sponsorship elements of international terrorism -- the very components which together form the enemy's Clausewitzian "center of gravity." By identifying the elites, removing them from their followers and protected sanctuaries, and undermining the sovereignty of their state sponsors, extraterritorial apprehension has the potential for striking a decisive blow at the heart of one of the West's most dangerous enemies.

To be certain, this measure must be applied only when national or collective self-defense is at stake and when less coercive measures to gain prosecution or extradition prove ineffective. Its use must be weighed against the threat posed to the apprehending force, the possibility of collateral injury to innocent persons, and the impact of countervailing actions mounted by sympathetic terrorists and the sanctuary state. Nor will extraterritorial apprehension be effective in every case. Once instituted, terrorist elites can be expected to be even more secretive as to their location, more concerned for their physical security, more unpredictable in their movements, all in an effort to frustrate apprehension operations.

But even with these limitations, extraterritorial apprehension offers an option which, perhaps more than any other pro-active counterterrorism measure, is consistent with democracy's genuine commitment to the preservation of civil liberties and human rights. Unlike most other pro-active measures, overt or covert, the objective of this option is a nonviolent end product.

By openly trying apprehended terrorists in a legal system which functions subject to well established constitutional and common law constraints on state action, the strength of the democratic form of government is reinforced for the world to see. The trial of the apprehended terrorist may be seen as a reaffirmation by the United States and the Western democracies as confidence in, and dedication to, their systems of government. Moreover, extraterritorial apprehension can be applied in a manner which actually serves to advance the cause of nationally and internationally recognized human rights.

Extraterritorial apprehension and the subsequent application of the criminal law in judicial proceedings is a strategy option which is wholly consistent with open democratic processes and human rights values fundamental to the United States and its allies. It is precisely this which makes extraterritorial apprehension an attractive counterterrorism measure for the United States. As a pro-active measure, it does not subvert and undermine the fundamental values of our society. Rather, it tends to reinforce those values in direct opposition to the objectives of international terrorism.

A close examination of this option also demonstrates that far from undermining efforts to expand international cooperation in law enforcement, it compliments United States and Western allied policy. The proposed measure imposes a meaningful sanction on those few states which consistently resist both the antiterrorist conventions and efforts to improve cooperation through bilateral or multilateral extradition agreements. Moreover, it underscores that the sovereign's rights are counterbalanced by its obligation to other states and to the minimum world public order system itself. The message delivered is very simply -- act responsibly to support the minimum world public order system or have your rights as a sovereign challenged by those threatened through your inaction.

If extraterritorial apprehension is to strike a decisive blow against international terrorism as suggested by this study, it must be applied aggressively over a period of time. If so applied, it will clearly offer the United States and its allies some element of retribution for the heinous crimes perpetrated against their institutions and nationals. Far more important, the aggressive application of extraterritorial apprehension and concomitant criminal prosecution stands a good chance of detering state sponsorship of terrorism while at the same time directly interdicting the activities of the terrorists' networks. If this measure does nothing more than cause concern to the sponsors of terrorism and undermine the self-confidence of the terrorist movement, it will have been of significant value. In all probability, it will accomplish far more.

While undertaking such a strategy will not be an easy task, its potential benefits may be well worth the investment of time and resources. The extraordinarily difficult job given to the intelligence community in dealing with international terrorism will only become more difficult if the end product is criminal prosecution. Government agencies and departments with varied missions and conflicting doctrines will be required to rise above bureaucratic interests for a common goal. Doubtful allies will have to be persuaded or lead. But the strength of the American people and their government is the ability to seize the initiative and stay the course. The American people and their Congress have signaled their strong support for pro-active counterterrorism measures. This study proposes that the National Security Council give serious consideration to recommending the President adopt extraterritorial apprehension as one of those measures.

NOTES

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Chapter VI

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Senator SPECTER. And I would like for you to respond in writing to what I consider to be a very excellent analysis on the legality under international law of the use of this limited force, these arrest procedures. As Commander Fessler points out, a lesser use of force, without getting into the issues and merits of the Libyan raid, as a way of accomplishing a strike against terrorism. I will submit this and ask for your response in writing.

Attorney General MEESE. I would be very happy to do so.

Senator SPECTER. Thank you very much.

The CHAIRMAN. I thank my colleague.

I want the record to show that we no longer have any lights out there and no one is sending messages and they are all sticking to 15 minutes. I do not know whether we should——

Senator SPECTER. Ten minutes.

The CHAIRMAN. You were sticking to 15. We were shooting for 10. If you get out in 15, I figure we are ahead of the game.

Senator Heflin?

Senator HEFLIN. Well, I have a number of questions that would take quite a length of time to answer. I would like permission to submit several in writing, including some on the State-Justice Institute and other issues. But I would like to spend my time on a couple of other areas. It is not my intent to go into matters pertaining to the Iran controversy other than as they might affect the jurisdiction of this committee. I am on the Select Committee and we would I assume ask questions of you at various times there.

I think the appointment of Mr. Webster is an excellent one based on his reputation. However, I am concerned about the FBI and the Department of Justice in a very crucial period of around November 21 through November 25 of 1986, November 25 being when you announced that there had been a diversion of funds to the Contras. According to various reports, the Senate Intelligence reports and verified newspaper accounts I believe, you learned of the April 1986 memo, an undated and undirected memo, which in effect said that there had been diversion.

According to statements that have been made and, I believe, testimony that has been given, after you learned of this, probably through Mr. William Bradford Reynolds and others, you telephoned and discussed this memo with Mr. Webster of the FBI and, according to reports at that time, the conclusion of the conversation was that no crimes had been committed and, therefore, the FBI did not come into it.

Now, am I right in that? Or if it is wrong in some part, would you tell us exactly what happened in relationship to you and Mr. Webster pertaining to the FBI after you learned of the April 1986 undated memo?

Attorney General MEESE. After I learned of that—your facts are wrong, Senator—after I learned of that memo, we proceeded to find out what that memo meant and whether in fact there had been actions taken that were described in the memorandum. We also proceeded to learn whether there would be any possible illegality arising out of this series of transactions, and when it appeared that there was at least a possibility that some legal actions might have been taken, at that time I talked with Director Webster and advised him that we would be bringing the FBI into this matter and that it presently had been referred for a preliminary plan of action to be developed and a preliminary analysis of the law by the Criminal Division, and asked him to alert the FBI, which he did and the FBI, as soon as the Criminal Division was ready, was brought into the matter.

Senator HEFLIN. Now, following that conversation, you made an investigation in your capacity not only as Attorney General but also as a member supposedly of the National Security Council—naming a lot of different hats that you have worn, as you have, which really caused problems. During that time, according to the Senate Intelligence Committee and the Tower reports, you had discussions with North, Poindexter and perhaps others, and then you had a team of lawyers from the Department of Justice who interrogated or questioned—depending on how you use the semantics—with North and Poindexter a great deal.

As of the 25th, which was the date of the public announcement, after you talked to North and the others, did a team of lawyers come in from the Department of Justice and interview North, Poindexter and others?

Attorney General MEESE. First of all, there were no interviews by Department of Justice lawyers that I know of that took place after we had started the investigation and brought the FBI in. The only interview that was held with Mr. North to my knowledge was the interview that I had with him on Sunday, the 23rd of November, in which I talked with him to find out whether there was any truth to what was stated in this memorandum, and then I had to leave that particular session and other lawyers who had been with me during the discussions with Mr. North continued for an hour or so after I left, but that was all prior to the conversation that I had with——

Senator HEFLIN. One continuous interview, interrupted by your departure?

Attorney General MEESE. That was prior to any finding or any determination that there might have been illegalities and the criminal investigations starting.

Senator HEFLIN. When did the FBI come into this?

Attorney General MEESE. The FBI, actually Director Webster was alerted the same day that a formal criminal investigation started, which was the 25th of November, and the actual activities of them going out and doing things was on the 26th.

Senator HEFLIN. But you did have a conversation with him on Friday, the 21st as to the——

Attorney General MEESE. No. On Friday, the 21st, I did have a conversation with him, at which time we had not looked at anything or seen anything or talked to anybody, and there was absolutely no indication of any illegality or any wrong-doing at that time, and we both——

Senator HEFLIN. Well, you had your report with you.

Attorney General MEESE. No, we did not have that report.

Senator HEFLIN. You did not have it then?

Attorney General MEESE. No, sir, we did not find that until much later, and at that time we both agreed that not only was there no basis to bring the FBI in, but it would look like an improper political use of the FBI had we done so.

Senator **Heflin**. Now, let me ask you a little bit about what Senator Specter went into regarding the issue of the constitutionality of the independent counsel. Your predecessor, Mr. Smith, wrote a letter following the Tim Kraft investigation which raised the question of the unconstitutionality of the independent counsel, and the question the defense of Mr. Gallinghouse arose relative to this matter. Mr. Smith wrote a letter in which he questioned the constitutionality of the independent counsel.

Do those concerns that he expressed still exist in the Department of Justice today?

Attorney General **Meese**. There are serious concerns in the department and among the legal scholars generally as to the constitutionality of the Independent Counsel statute. I have asked for a complete review in a very short time span of this issue, so that we can have an entirely new look at it and to see to what extent we would be able to defend the constitutionality of the statute.

Senator **Heflin**. Not only in the North matter and in the Deaver matter, but you have other independent counsel investigations going on. I have concerns myself about it. Basically, subclause (2) of clause 2, section 2 of Article II, confers on the President, all courts of law, and heads of departments the right to appoint inferior officers, and the question of whether or not the independent counsel is an inferior officer raises questions particularly when under the statute he really is a substitute for the Attorney General, a substitute for a U.S. District Attorney and a substitute for the Assistant Attorney General in charge of the Criminal Division. The powers given to him are great in regards to that.

Of course, there is a matter of some control that the Attorney General has, such as dismissal for good cause. But with all of this in the background, in the event that there is a serious concern about the constitutionality of it, then rather than wait until the United States Supreme Court or a Court of Appeals rules, is it not possible to remedy this situation by an amendment to the Act? It would appear to me that if there is a serious question, we have to decide that and should decide it fairly rapidly. And if it is such a serious question, rather than jeopardize all of the various independent counsel proceedings, then there ought to be a cooperative effort between the Department of Justice and Congress to amend the Act to try to cure any possible constitutional invalidity that might exist.

Now, I have made the suggestion that the Department of Justice, along with Senate Legal Counsel, review this, rather than gamble towards the future regarding these matters. Would you be amenable to looking into that as a proper approach?

Attorney General **Meese**. I certainly would, Senator, and I think that is an excellent suggestion and I think that remedying the law to cure any potential constitutional defect obviously would be a way to facilitate the on-going investigations. There are some other techniques, too, we are exploring, but that would certainly be one way if Congress was capable of acting that quickly.

Senator **Heflin**. You would have to have at least three goals: one to cure its constitutional defects, and the second is still to provide independence where there is no conflict of interest, and the third is to try to preserve what has gone on before and give some continuity to the proceedings as they exist to date.

Attorney General **Meese**. I would agree, and that is what we want to do. Again, remembering the previous colloquy with Senator Specter, there are some things we cannot do retro-actively.

Senator **Heflin**. I believe my time is up.

Senator **Metzenbaum** [presiding]. I believe that Senator Humphrey is next.

Senator **Humphrey**. Thank you, Mr. Chairman.

First, I want to dissent from some of the views expressed at the last meeting of the committee, of which the Attorney General was present. The administration was accused of being responsible for certain racial incidents which have recently taken place. I think that is a ridiculous charge, in any event one that is not borne out by the facts, and I want to try and clarify the record by asking a few questions of the Attorney General on that subject.

Mr. Meese, I understand that the Civil Rights Division has already prosecuted 55 cases involving racial violence in the 6 years of this administration, as opposed to only 22 such prosecutions during the previous administration's 4 years. Is that correct?

Attorney General **Meese**. That is correct.

Senator **Humphrey**. I understand further that the number of cases filed and the amounts of back pay—this is in connection with employment discrimination—the amounts have increased very substantially over the record of the previous administration. Is that correct?

Attorney General **Meese**. That is correct, Senator.

Senator **Humphrey**. And is it also correct that in the case of the housing and school desegregation, in the matter of the housing and school desegregation case in Yonkers, New York that you pursued, that in fact your efforts, the efforts of your department have been vigorously challenged in court as excessive and overreaching.

Attorney General **Meese**. Unfortunately, that has been true.

Senator **Humphrey**. Well, it seems that the department has taken criticism from both ends of the spectrum or at least two different kinds of charges are being raised, one that the department is not doing enough and the other that the department is acting excessively and is overreaching. It looks to me as though the facts and the statistics indicate that something in the middle, a middle ground is a more accurate description of the department's efforts than some of the charges that we have heard raised in this committee.

I want to talk about the judicial selection process, Mr. Meese. As we know, in the Carter administration the process was largely influenced by judicial screening panels. Am I correct in my understanding that those panels asked potential nominees their specific views on certain issues of the day? Do you know about that?

Attorney General **Meese**. I have no personal knowledge, Senator, but I do know that some considerable research was done on that subject by the American Judicature Society and other groups that are interested in judicial selection and that such findings were made, yes.

Senator **HUMPHREY**. That such findings were made that the potential nominees—they had not yet been nominated at that point, had they?

Attorney General **MEESE**. As I understand it, they had been selected for judicial positions or at least were under consideration for judicial positions, and questions on issues, specific policy issues were asked of them on matters that would likely come before them as judges.

Senator **HUMPHREY**. They were asked such things as their views on the Equal Rights Amendment, is that consistent with your understanding of the process?

Attorney General **MEESE**. That is what I understand, yes.

Senator **HUMPHREY**. They were asked questions on their views of affirmative action programs?

Attorney General **MEESE**. I understand that this was revealed by the study, yes.

Senator **HUMPHREY**. I understand that all of that is documented, there is no question about that, that that is all documented.

I am not so sure that is all that bad. I mean is any President supposed to nominate persons for lifetime tenure on the bench with only a vague idea of what kind of opinion such a judge might render?

Attorney General **MEESE**. Senator, I think it is more important in selecting a judge that you find what his or her particular approach to the judiciary is, how they view such subjects as judicial activism and so on. I think it is wrong to try to inferentially or implicitly bind them to take certain positions or to hint to them by the questions that unless they adopt a certain position on a policy issue that might come before them, they are not going to be considered favorably by whoever is doing the job of either appointing, nominating or confirming.

Senator **HUMPHREY**. Quite so. The judicial temperament of a nominee is important. Putting that aside, is it still not important to determine a nominee's views on important issues of the day? Supposing this were 1850, it would be inappropriate for a President—I do not recall who was President in that year, but would it be improper for a President who was concerned about the issue of slavery to ask the persons he was considering nominating to the bench their views on slavery?

Attorney General **MEESE**. I think asking them their views on specific matters or to imply how they would vote as a judge would probably be improper. On the other hand, asking general views on constitutional principles or principles of human rights, I think that would be entirely appropriate.

The thing that you want to avoid, and which has happened in some past administrations and has happened in some questioning by Senate committees in the past, has been the idea of a kind of a litmus test, that if you do not somehow subscribe to certain preset or prejudged positions by the questioner, you are not going to get appointed or confirmed, and that I think would be improper.

Senator **HUMPHREY**. I understand the distinction that you are making, that there should be no attempt, explicitly or implicitly, to bind any person considered for such a nomination to make a certain decision under certain circumstances.

Still I think it is important, do you not agree, to find out a candidate's general views on some of the most important issues of the day?

Attorney General **Meese**. I think that it is more important to find out how they would approach these issues as a judge, whether they would do it on the basis of the Constitution, because many times how a person may feel personally on an issue of the day may have no relationship to the judgment he or she would have to make on a specific case before them. I think there is a danger in asking for too specific views on some issues of the day, as opposed to that person's approach to his or her responsibilities as a judge.

Senator **Humphrey**. How is the President supposed to put his stamp on his administration, including the appointment of judges, if he cannot ask potential nominees their views on specific issues? Is the President just supposed to—in other words, it comes down to this: Is the President supposed to nominate somebody strictly on the basis of that person's judicial temperament?

Attorney General **Meese**. Not strictly on the basis of their judicial temperament, but rather on the basis of judicial temperament, combined with a number of other qualities about which Senator Leahy asked questions—intellectual capacity, breadth of experience. Also on this issue, I think that it is a matter of determining the potential judge's approach to his or her job—is this person going to look at the matter on the strength of the relative cases, is this person going to decide on the basis of sound constitutional principles, is this person going to apply the law as it was made by the legislative bodies, not as he or she might think it ought to be. Those are the kinds of things I think are most appropriate.

Now, in many cases a President will have a general idea of this individual's approach to a number of public issues. Maybe he has made prior public statements. But I think that it is the way in which they are going to decide cases, rather than their personal or political views, which are important in terms of whether a person is qualified or not qualified to be a judge.

Senator **Humphrey**. Thank you.

The **Chairman**. Thank you very much. We will now go back to order of seniority, but I will withhold and yield to my colleague from Massachusetts and then to Senator Metzenbaum or to a Republican if they come back in.

Senator **Kennedy**. We are all waiting for the President's speech on Iran this evening and in many ways the success of the remainder of his presidency I believe turns on it. Almost everyone now seems to feel that the President was badly advised on his dealings with Iran. He obviously cared deeply about the hostages. No one doubts that he had the best of intentions.

One of the fundamental issues is whether the President thinks he was trading the arms for hostages. The Tower Commission was unequivocal that it found that whatever the intent almost from the beginning of the initiative became "in fact a series of arms for hostages deals." That is what the whole country thinks, that is what the whole world thinks, not just what the Democrats are saying, it is what the Tower Commission has said.

Now, just last Saturday one of the last holdouts, Vice President George Bush acknowledged the same thing, that the Iranian initiative became an effort to swap arms for hostages and here it is on the front page of the Sunday Washington Post, "Vice President Bush acknowledged today for the first time that the United States had attempted to trade arms to Iran for hostages, and the policy failed the American people and it failed the President."

Now, Mr. Meese, after four straight months of Irangate, we pick up this morning's Washington Post, we read what you said to a group of high school students in Philadelphia last Sunday, and I quote. The Post said, quoting yourself, "When the President said he was not dealing arms for hostages, he was absolutely correct because he was not dealing with the captives." Now, did you say that?

Attorney General **MEESE**. Senator, this was a typical journalistic cheap shot that you saw in the paper this morning——

Senator **KENNEDY**. Well, did you say it?

Attorney General **MEESE**. Let me explain—that actually what I did say—this was taken out of context—what I did say in response to a question from a high school student, and the question was how can the President believe that he was not trading arms for hostages when in fact arms were exchanged for and hostages were received. And I explained the President's perception, that it was never his intention to engage in a ransoming of the hostages, that he was not dealing with the captors or those who had been the hostage-takers, and that in his view it was a matter of a larger strategic initiative with Iran and that in fact that was his perception of the thing.

I also said at the same time that I could understand how it could be perceived as an arms for hostage situation, because both arms and hostages were involved, but it was not a direct relationship between the arms and the hostages in the sense that arms were given or any other ransom were given to the captors. That was the sense in which I answered the question.

Senator **KENNEDY**. Well, the quote is quite clear. I mean it said when the President said he was not dealing the arms for hostages, he was absolutely correct. Now, did you say that?

Attorney General **MEESE**. I was talking about the President's perception and, as I say, you have to understand the total context of the question in order to understand how that phrase was appropriate in answer to the question.

Senator **KENNEDY**. Well, because he was not dealing with the captives. Do you stand by those words which you used?

Attorney General **MEESE**. I stand by my entire statement, of which that was a part, but you have to understand the context, not the particular sentence there.

Senator **KENNEDY**. I think it is the context. I mean the American people understand the context. You were asked a question and it is quite clear at least in this quote what the words were. You said he was not dealing the arms for hostages, he was absolutely correct, he was not dealing with the captors. That is completely in conflict with what the Tower Commission has stated and it is in conflict with what the Vice President has now stated, and I think one of the things that we have seen over the period of time is that the President was obviously getting poor advice and it seems to me that if that is what your understanding of the nature of those kinds of negotiations that were taking place, that is the kind of either advice, they got the President in trouble.

Attorney General MEESE. Senator, my advice was not involved in his saying anything like this, so that you can ease your mind on that. However, as I say again, you are again quoting a newspaper, which is always dangerous, but you were mischaracterizing——

Senator KENNEDY. Well, they are your words.

Attorney General MEESE. May I finish? You are mischaracterizing what I said and the way in which the question was asked and the way in which my reply was applicable and it is not inconsistent with the Vice President or the Tower report.

Senator KENNEDY. Well, we will let the record stand, and I would include the whole article in the record.

Attorney General MEESE. No. If you are going to be correct, you had better include the entire question and answer from the day that I spoke.

Senator KENNEDY. That would be fine, but at least in terms of our report this morning, you are not denying at least that you used these words and that they were part of your response, when you said that the President was not dealing the arms for hostages, he was absolutely correct. Those are your words. I do not know how you can frame those in any other kind of context and confuse their meaning.

Attorney General MEESE. Senator, if you would perhaps read the whole transcript of what I said, you would understand.

Senator KENNEDY. Let us move to the Sentencing Commission. I have enjoyed working with the administration in trying to deal with some strong and effective anticrime legislation. On the committee we have rejected a good many of the symbolic measures which you and the administration have advanced, the habeas corpus death penalty exclusionary rule, which had little significant impact on crime.

The Justice Department now seeks to undermine the important bipartisan achievement of the criminal law reform bill of this administration and the Congress, the Omnibus Crime Control Act of 1984, by trying to slip the death penalty in the backdoor of the Sentencing Commission. When the omnibus crime bill was up before the committee, the report indicated "to enhance the potential for the ultimate enactment of a comprehensive crime bill, the committee decided to deal with a number of more controversial pending issues in separate legislation, accordingly, bills on capital punishment were introduced and reported to the Senate on August 4, 1983."

Majority Leader Baker, commending Senator Thurmond and Senator Biden for bringing a consensus bill, pointed out on the floor, "The bill has stripped out of it the major controversies, that is the death penalty, exclusionary rule, habeas corpus, other highly contentious matters." And during the Senate consideration of the omnibus crime bill, Chairman Thurmond explained, "Capital punishment is controversial and we took it out of the package."

Now, why does your Justice Department keep trying to put it back in and circumvent the law, the omnibus crime bill law and the very clear letter of the law and the intention of the committees and the Congress?

Attorney General **Meese**. We are doing no such thing.

Senator **Kennedy**. Well, you have been—what has been the Justice Department's position with regard to the death penalty and the Sentencing Commission?

Attorney General **Meese**. The Justice Department was asked as a matter of law whether the mandate, the legal mandate for the Sentencing Commission would include their consideration of guidelines for the death penalty. After a careful analysis of the law, it was our conclusion, abiding by the strict letter of the law and the statute, that they did have that authority should they wish to exercise it.

Senator **Kennedy**. Well, that is the point. That is exactly the point that we are making, how you draw that conclusion and how the department can draw that conclusion when both the principal sponsors, who have differing views on the death penalty, we can differ in our own views on the death penalty—we do, and we have got wide diversity on this committee, and any fair reading of both the legislation and the statements that have been made by those on the committee demonstrate very clearly that that was excluded and you are trying to include it.

What weight do you give then to the statements of Senator Thurmond with regards to, "Accordingly, bills on capital punishment were introduced separately," or Majority Leader Baker, who at that time was Majority Leader of the Senate, pointed out the same thing. The other members of the committee, myself included, who were part of the whole coalition, the same thing, and we have rejected in the Senate particular legislation dealing with the death penalty and now your department says we are going to slip it through the backdoor, so to speak.

Attorney General **Meese**. Actually, Senator, the Senate has not rejected the death penalty as a subject. As a matter of fact, the Senate has passed many times death penalty bills. However, in this particular matter we are talking about two separate things.

One is the Senate did not include in the Comprehensive Crime Control Act of 1984 a specific provision whereby the Senate would have changed the law relating to the procedures for the death penalty. It is my understanding that as far as the duties or responsibilities or authority of the Sentencing Commission itself, there was no colloquy within the Senate as to whether or not the Sentencing Commission would take up the death penalty. What we were faced with when the request came from the Sentencing Commission was to look at the plain meaning of the law and to render an opinion on it, which we did, and I would be happy to supply you with the legal reasoning that supports that position.

Senator **Kennedy**. You can supply the legal reason. The clear statements of the prime sponsors I think are very clear about both what the specific language said and what the intent was. That Sentencing Commission has no more authority than what was granted by the Congress, and it was quite clear that any fair reading both of the principal sponsors of the legislation and the floor debate did not give the power to the Sentencing Commission to include the death penalty, and you have been trying to circumscribe the intention of the Senate on this, and if you are going to persist on it we will have an opportunity to pursue this issue in the courts.

Attorney General **Meese**. First of all, let me say again for the record that there has been no intent whatsoever to circumvent the intent of the Senate, but only to respond to a request for a legal opinion which we did in our usual careful and I think accurate way, and I will be happy to file a copy of that opinion with the committee so that that can be seen.

The **Chairman**. I would appreciate that, but let me take the prerogative of the Chair and add to what Senator Kennedy said. It was unquestionably the understanding of the sponsors of the bill, Senator Thurmond and I and many others who worked on this, we agreed specifically that we would not consider four or five very controversial issues, one of which was the Sentencing Commission, because we looked at a 15-year history of a logjam whenever that occurred in order to get a major rewrite of the Criminal Code and the Sentencing Commission.

I, along with Senator Kennedy and others, have let the chairman of that commission know that it was clearly the intention of all who were involved that it was not within the purview of the commission. That is why, by the way, we passed the minimum mandatory life imprisonment, no probation, no parole for capital offenses as part of that process. We would not have done that had we even contemplated the death penalty would be part of it. That was clearly meant as a substitute for that.

I hope that the chairman of the commission will take that into consideration because, very bluntly, General, if he does not, I can assure you that the Sentencing Commission is going nowhere, there will be no change in the guidelines. It is a clear violation of the understanding we had here in the Senate.

I understand your position, you have a right to make that position clear, but I just want to make sure that there is no misunderstanding as to what we all thought, Democrat as well as Republican up here, and also what will likely be the fate of that commission, and it is a critical change that has to take place—critical. That is, the Sentencing Commission's job and function. We worked, starting with the leadership of Senator Kennedy, fifteen years ago, it's almost that long, isn't it—fifteen years ago to deal with this issue, and I think we were very tough, we have made some tough changes and tough guidelines, we did not coddle anybody, we gave the commission some significant authority, but one of the grants of authority that was passed on from the Congress was not to include the death penalty and I think it would be a tragic mistake.

Let us fight that out, General, in this session of Congress and in future sessions of Congress, that is fair game, but it was specifically excluded and I would be happy at another time—I do not want to take more of my colleagues' time here. You know, I have passed that view on to you and I want to make it known publicly and I just think it would be a serious mistake if we persist in adding that to ~~the~~ commission.

Attorney General **Meese**. We are not adding anything to the commission. The decision is, of course, the commission's. We are only providing legal advice.

The **Chairman**. I understand.

Attorney General **Meese**. I would only want to make sure the record shows that it was not specifically mentioned in the section of the bill pertaining to the Sentencing Commission, that that section of the bill and all the legislative history pertaining to that section is silent on the issue of the death penalty, so——

The CHAIRMAN. Well, we will dig up a number of colloquies we had, both in the committee and on the floor as it related to the overall intention on the bill.

Attorney General MEESE. There is no question on that, Mr. Chairman.

The CHAIRMAN. Okay.

Attorney General MEESE. And as to the overall intention of whether you would consider capital punishment procedures as a subject for the changing of those procedures, it is my clear understanding that in the section relating to the Sentencing Commission, both the legislative history and the actual language of the Sentencing Commission authorizing provisions are silent.

The CHAIRMAN. Well, I would suggest that is a bit of a tautology, but I will not go on now. How could we possibly be in the circumstance where the condition upon which we would even bring the bill up, which including the Sentencing Commission, was that we not consider capital punishment, how could we in fact have agreed to that and it not be implicit that once the commission got going it would not in fact be commissioned by the Congress to add what we explicitly agreed could not be part of the overall bill?

Again, this is not the time to make this argument. I hope that the commission sees the wisdom of that position. If they do not, I am afraid—I promise you, I am not trying to be threatening, I am just stating a fact. As old Walter Brennan used to say on a program, "It ain't brag, man, just fact." The fact of the matter is, if it is in the commission, the commission is dead. It is that simple. I mean I do not see any way that that changes.

At any rate, let me yield to my colleague from Iowa, a State that I have come to love, and then Senator Metzenbaum, a man whom I adore. [Laughter.]

Senator GRASSLEY. Senator Biden has not asked me for my support yet.

The CHAIRMAN. I will ask you now, I would like your support. [Laughter.]

Senator GRASSLEY. Mr. Attorney General, I have several questions that deal with PLO offices in the United States, and this would be a follow-on of the Republican Leader and myself and several other colleagues sending a telegram to the President last fall at the very time that the PLO claimed credit for a bombing in Jerusalem in which several people were killed.

Do you think that the PLO Information Office in Washington should file reports with the Department of Justice's Office on Foreign Agents more regularly? And it is my understanding that they have to do it once a year anyway, but should they do it more regularly?

Attorney General MEESE. Senator, my understanding is that they are now complying with the law, and to the extent that there is any basis to require them to file more regularly, it would have to depend upon some statutory basis. I know of none at the present time, but I would be happy to look into that matter further and reply to you in writing as to this subject.

Senator GRASSLEY. I have reason to believe that if you wanted them to file reports more regularly, they could. Now, I am not in——

Attorney General MEESE. I think the question is whether there would be any efficacy to doing that, but I will be happy to look into the matter.

Senator GRASSLEY. Thank you. Does the United States have the right to regulate the size of the PLO office?

Attorney General MEESE. If the entity is a diplomatic mission, I believe that there may be some basis for doing this, as we would with the missions of a foreign country, although they are not under the diplomatic laws. They are, in effect, like any other private organization, so there are some limitations. Again, I would have to look into that particular matter, but I question to what extent we would be able to regulate a private organization that is not specifically violating the law.

Senator GRASSLEY. Okay. Well, would you know whether the Foreign Missions Act would apply to the PLO offices?

Attorney General MEESE. It is my understanding—again, I will check this to be sure, but it is my understanding that it is not because they are not the mission of a foreign power.

Senator GRASSLEY. Does Chapter 18 of U.S. Code 2386—I believe that is called the Voorhees Act—would it apply to the PLO?

Attorney General MEESE. Again, I would have to find out.

Senator GRASSLEY. Now, that particular Act would require organizations that have civilian military activity, to file statements of assets. I can appreciate the fact that you might have to respond in writing. In fact, if it would give you time to think about these to a greater extent, I do not mind that at all.

The personnel of the PLO mission in New York, this personnel have had what we call "invitee status" at the United Nations, and this has been going on now for at least 10 years. Would it not make more sense to have the PLO observers here simply while the U.N. is in session, just for the duration of that U.N. session and not all the time?

Attorney General MEESE. I am sure that there are some arguments that could be made that way. This is a subject, Senator, on which I would prefer, for a number of reasons, some of which I cannot discuss here, to respond to you in writing.

Senator GRASSLEY. Okay. I do want the responses from you and not from the State Department, when we contact the President on this.

Attorney General MEESE. I can assure you that all the responses you get on this subject will be directly from me and from the Department of Justice.

Senator GRASSLEY. Good. Now, my last question deals with the same subject, that is the application of the RICO statutes to members of the PLO in that it is be unlawful to derive income from or associate with an organization which engages in murder and kidnapping, and not only does the PLO engage in it but they brag about it, and I would be interested in your thoughts on that subject, and set your thoughts in writing. If RICO is not applicable then I think we may see some legislation in this area.

Attorney General **Meese**. I would be happy to respond to that matter.

Senator **Grassley**. Thank you.

The **Chairman**. The Senator from Ohio.

Senator **Metzenbaum**. General, I heard your answer with respect to the question of the Attorney General going into the courts to defend the constitutionality of the independent counsel. I am in no position to comment as to whether it is constitutional or not, but I can say to you that in view of the situation in this country at the moment, if the Attorney General of the United States is not in the courtroom defending its constitutionality, the perception of that by the American people is going to be devastating to the administration. The administration does not need any advice from me, but I think all of us are concerned about the presidency and the respect that we have for it.

I just want to say to you as strongly as I know how that if the administration comes down on the side of the independent counsel not being constitutional or if it refuses to participate, I believe the perception will hurt this administration beyond repair.

Now, let us face the facts of a totally different subject. The record of this administration in complying with the law and ethical standards is a shame. We now learn that the members of the Cabinet and senior White House staff have engaged in highly questionable practices regarding the Iran-Contra matter, and I do not have to tell you or detail for you how many appointed officials in the last 6 years have been fired or resigned in disgrace.

I recollect very vividly the Washington Post 2-page spread, with picture of the various people who have either resigned or have been fired in disgrace. Currently, there are at least six independent counsels conducting investigations.

Now, frankly, I must say to you that I have serious concerns about the way you personally have carried out your responsibility regarding the statutes up until now. Let me ask you first about the latest appointment of independent counsel.

On October 5, 1986, Eugene Hasenfus was shot down over Nicaragua on a flight to deliver weapons to the Contras. He claimed that he was working for the CIA. News reports linked Hasenfus' associates with other administration officials.

On October 17, eleven members of the House Judiciary Committee asked you to request an independent counsel to investigate administration links to the Contras, and they referred you to the Kerry report. The Kerry report detailed allegations that government officials were supplying the Contras with military aid, in violation of the Neutrality Act and the Arms Export Control Act.

On April 20, 1986, the Miami Herald ran a story detailing a series of meetings involving CIA and White House officials planning a private network to fund the Contras. Another article suggesting that government funds and assistance were being illegally provided to the Contras appeared in The New Republic in November 1986.

Despite all these allegations of administration involvement and of illegal aid to the Contras, when you requested appointment of an independent counsel to investigate this issue, you asked that the issue involve around the matter of whether government assistance was being illegally supplied to the Contras. You recommended that the court appoint an independent counsel on the question of whether funds from the arms sales were diverted to the Contras, a much narrower issue.

You know and I know that the court expanded upon your request. Now, you had to be aware of grounds to suspect administration involvement in obtaining and coordinating support for the Contras at a time when the support was banned. My question to you is why did you not ask the broader question and why did the court have to come in and broaden the issue? I have difficulty in following your thinking.

Attorney General MEESE. First, Senator, I think it appropriate that for the record I not allow your initial comments about this administration to go unchallenged. This administration has a record of integrity and honesty in its officials and I challenge completely your characterization of this administration in your earlier comments. We hardly need you to be making statements about the ethics of this administration.

However, to respond to your question particularly, as to why we made the request for an independent counsel the way we did, this matter was thoroughly investigated by career prosecutors within the Justice Department and their recommendation to me was that under the Independent Counsel Act the appropriate requested authority from the court for an independent counsel was that which we requested, and that the facts of the case as known to us justified that grant of authority and that was what pertained to covered persons.

I might say that the independent counsel statute does not talk about administrations, it talks about specific covered persons. Even in the request that we did make, there was some considerable question as to whether a covered person was involved. We were able to overcome this hurdle because I felt it was a matter in which an independent counsel was appropriate and so we made the request based upon the facts, which it is our responsibility to do.

Senator METZENBAUM. But it is a fact that the court then broadened that order.

Attorney General MEESE. The court in its wisdom did decide to do that, and whether they acted properly or not, I imagine will remain to be seen.

Senator METZENBAUM. Let me talk to you about another case. In the *Olson* case, you were asked by the House Judiciary Committee to request the appointment of an independent counsel to investigate charges that Deputy Attorney General Schmults, Assistant Attorney General Olson, and Assistant Attorney General Dinkens had lied to Congress about the administration's withholding of Environmental Protection Agency documents. Instead, you requested that only Mr. Olson be investigated by an independent counsel.

You informed the House committee that Mr. Schmults lacked any criminal intent and an independent counsel was unwarranted. Now, is it not true that the independent counsel appointed by the court subsequently sought permission to investigate Mr. Schmults and you denied the request?

Attorney General MEESE. That is correct.

Senator METZENBAUM. How long have you been a friend of Mr. Schmults?

Attorney General MEESE. I would call myself an acquaintance of Mr. Schmults and a friend in a general sense, but I have known Mr. Schmults—well, as far as a friend, it is hard to say, but I have been acquainted with Mr. Schmults for a considerable period of time. I have worked with him in the administration, as I have with some perhaps 300 or 400 other people, but I have no close personal connection with Mr. Schmults or any other relationship which would preclude my complete independence of judgment in this matter.

Senator METZENBAUM. You went to college with him?

Attorney General MEESE. We went to the same college, along with 4,000 other people, yes.

Senator METZENBAUM. Is it not also true that as counsel to the President at the time of the relevant inquiry into the EPA you were involved in developing the administration's response to Congress?

Attorney General MEESE. First of all, I was not counsel to the President at that time. I was the Counsellor to the President, which is a policy, rather than a legal position, and I attended some meetings in which this was discussed but I was not actively involved in developing the administration response, no.

Senator METZENBAUM. Now, did you participate in the development of that position?

Attorney General MEESE. I participated in meetings on the subject of the EPA as to the specific matters that were allegations forwarded to us by the Senate committee about matters that were given by the Justice Department to the committee that were not given, I did not participate in those particular decisions, no.

Senator METZENBAUM. Regulations of the Department of Justice require any employee, including the Attorney General, to refrain from participating in any criminal investigation if he has a personal or political relationship with any person substantially involved in the conduct that is the subject of the investigation. Did you not have a personal or a political relationship with Mr. Schmults.

Attorney General MEESE. Not in the sense that was involved in those regulations.

Senator METZENBAUM. But you did have a personal relationship with him?

Attorney General MEESE. Not to the extent that would fall within those regulations.

Senator METZENBAUM. Let us go on to another one. It is my understanding that the staff of the Office of Public Integrity Section recommended that an independent counsel be requested in the *Whittlesey* case. Am I correct that that recommendation was overruled?

Attorney General MEESE. No. The investigation by the Public Integrity Section—I would have to check to be sure, but I do know that the senior prosecutors in the department, the senior career prosecutors recommended against an independent counsel being appointed in that case.

Senator METZENBAUM. Are you saying that the Office of Public Integrity Section did not recommend, did not request an independent counsel?

Attorney General MEESE. I would have to check, but I do remember that the recommendation from the senior prosecutors were that there not be an independent counsel in that case.

Senator METZENBAUM. Of course, you do not accept newspaper reports as having much validity, but this is——

Attorney General MEESE. That is correct.

Senator METZENBAUM [continuing]. This is December 7, 1986, from your favorite paper, the Washington Post, in which they state that the principal investigator of the case in the Justice Department's Public Integrity Section recommended an independent counsel but was overruled by more senior officials, sources said. Do you deny the accuracy of that?

Attorney General MEESE. I am not going to comment on it.

Senator METZENBAUM. You are not going to comment on it?

Attorney General MEESE. No, I do not comment on newspaper reports.

Senator METZENBAUM. Well, then, let us say that I have been informed to that effect. Would you comment on that?

Attorney General MEESE. No.

Senator METZENBAUM. Without talking about my source, I have been informed that a senior—that the Office of Public Integrity Section did make such a recommendation but was overruled.

Attorney General MEESE. I can only say, Senator, that the recommendation to me from the senior career officials in the Department of Justice was that an independent counsel not be appointed. This was also the recommendation of the Assistant Attorney General in charge of the Criminal Division, and I concurred with that recommendation.

Senator METZENBAUM. Would you be good enough to furnish the committee with a copy of the report of the Office of Public Integrity Section as well as such other documentation as you want in connection with this matter?

Attorney General MEESE. I will look into seeing whether that would be appropriate.

Senator METZENBAUM. Well, is that a yes or no answer?

Attorney General MEESE. It is what I said it was, that I will look into it to see whether it is appropriate to furnish those documents to the committee.

Senator METZENBAUM. Can you tell me why it might not be appropriate?

Attorney General MEESE. There might be a number of reasons. The independent counsel statutes are very careful as to the security and the confidentiality of some documents, and I would have to look into it.

Senator METZENBAUM. And if there is no prohibition in the independent counsel statute or any other statute barring it, will you make that information available to the committee?

Attorney General MEESE. If there are no appropriate prohibitions against it, I would.

Senator METZENBAUM. Did you sign the notification to the court in the *Whittlesey* case, the report that the appointment of an independent counsel was unwarranted?

Attorney General MEESE. I believe I did, yes.

Senator METZENBAUM. When I reviewed the Whittlesey papers, I was surprised that you had signed the notification dismissing the case. You and Ambassador Whittlesey were both on the White House staff together?

Attorney General MEESE. Is that a question?

Senator METZENBAUM. Yes.

Attorney General MEESE. Yes, we were.

Senator METZENBAUM. And was not one of the items under investigation a dinner party given for you by Ambassador Whittlesey?

Attorney General MEESE. I do not believe that the dinner party was under investigation, no. I believe there was some question as to the accounting in relation to the expenses for such a party.

Senator METZENBAUM. But she did do a dinner party for you?

Attorney General MEESE. While I was there in Switzerland on one occasion, Ambassador Whittlesey had a dinner in which she invited members of the Swiss Parliament and other public officials and I attended that dinner at her invitation, yes.

Senator METZENBAUM. Was it in your honor?

Attorney General MEESE. I guess you could say that, I was one of several visitors who were there, yes.

Senator METZENBAUM. But you do not think that that violated the department's own regulations about criminal investigations in which you are involved if you have a personal relationship with any person substantially involved in conduct of the subject of the investigation?

Attorney General MEESE. Absolutely not.

The CHAIRMAN. The Senator is coming to the conclusion of his first round here?

Senator METZENBAUM. I am winding down, yes.

On the report that you made in connection with this, you stated that Mr. Eric Kunsman, a career Foreign Service officer, who was Ambassador Whittlesey's deputy, alleged that Ambassador Whittlesey ordered him not to release embassy records requested by State Department investigators. According to Mr. Kunsman, Ambassador Whittlesey told him that "your job depends on obeying any instructions and assisting me in defeating those investigating me."

Your report also notes for purposes of determining whether an independent counsel is required, any dispute about whether this or other similar statements were made was resolved in a light least favorable to Ambassador Whittlesey. I do not understand, given your own standards, how an impartial reviewer could dismiss further investigation of the obstruction of justice allegation if we accept Mr. Kunsman's testimony as true. Shouldn't Ambassador Whittlesey have been investigated?

Attorney General MEESE. Senator, after a thorough investigation of that matter and the recommendation of experienced career prosecutors and the senior members of the Justice Department's Criminal Division, the recommendation was that there was no basis under the law for an independent counsel investigation. As I told you, I concurred with that result after reading their report and I signed the request of the court.

Senator **Metzenbaum**. Thank you.

The **Chairman**. I yield to the Senator from Wyoming.

Senator **Simpson**. Thank you, Mr. Chairman. I am interested in some of those social notes there that we went through about your dinner parties around the world. I hope that you will take proper acknowledgement of that. We have all been out on the road together at various times and have been hosted in various countries around the world. It is a very common practice.

I must say that I was a little bit—tittillated, would be the word I guess—to find that many had been fired or resigned in disgrace. When I was practicing law in Cody, Wyoming, I remember how many were fired or resigned in disgrace from Lyndon Johnson's administration, Jimmy Carter's administration, or Ike Eisenhower's. It will always be the same because it consists of human beings, and some are goofy and some are zealots and some are pretty good. I always say to people, "You expect perfection out of an administration of either party, and you never get it because there is the same number of lightweights and screwballs and boobs in government and Congress as there are in the general population." That is because it is a representative government.

So it is interesting to hear that. You know, they tried to tack your pelt above the fireplace here for over a year. You remain a magnificent irritant to some here, and I do not think anyone is going to throw you out, so you ought to have some fun in the next couple of years. [Laughter.]

With that, I have one question. You know how we have worked on the immigration legislation, it is very important. Senator Kennedy chairs that subcommittee, with Senator Simon, and I am the ranking member. I am very pleased and looking toward them for the proper oversight activity.

One question: Recent reports indicate that INS apprehensions on the southern border have decreased, that Canada now is moving to strengthen its border enforcement, and that many Mexican nationals are less inclined to come illegally to the United States. I guess I would just inquire, are those affects attributable to employer sanctions which, of course, really are not totally in gear? Or has there been some reduced enforcement at the border causing this decline in apprehension? Just briefly, your comment on that.

Attorney General **Meese**. Senator, first of all, it is my understanding that actually the resources at the border that would be involved in apprehension have actually been increased as a part of our endeavor to beef up our border patrol activities. I would say that it is probably too early yet to precisely attribute cause and effect, but there has certainly been a number of observations made that it is entirely possible, perhaps even probable, that the new Immigration Reform and Control Act has had an impact on decreasing the illegal immigration over the southern border.

Senator **Simpson**. Well, I think it is important to share with all the employers in America that they should not be firing people. That is not what is required at this point. It is very critical. As I say, this is our approach toward a humane solution. We will see that it works, we will assure ourselves that it does.

Mr. Chairman, thank you very much.

The **Chairman**. Thank you for yielding and for the eloquent defense of boobs in and out of Congress. I thought it was magnificent and they all should thank you.

Senator **Simpson**. I was introduced the other day, and the guy said, "Now, the latest dope from Washington, here is Al Simpson." [Laughter.]

The **Chairman**. General, I am going to take my turn in this round now, if I may. In going back, I have two specific questions about a subject that has been covered a lot, first in the opening round and then again, and that is the counsel, the independent counsel.

You were named as the defendant in a lawsuit brought by Oliver North to enjoin the proceedings of the independent counsel in the *North* case. However, Walsh, the independent counsel who is calling on the telephone now I guess, has moved to dismiss this suit, which is set for Monday. Now, are you going to respond as Walsh did in that litigation, and when will you make the decision as to what your response will be, because it comes up Monday?

Attorney General **Meese**. We will be joining the independent counsel in a response. We will be filing our documents by tomorrow, which is the deadline, and we will also be seeking dismissal of the suit.

The **Chairman**. You will be seeking dismissal of the suit against North?

Attorney General **Meese**. That is correct—no, we will be discussing dismissal of the suit by North against Walsh and myself.

The **Chairman**. OK. But will you be taking the same position as Walsh?

Attorney General **Meese**. We have not finally decided precisely whether we will take all of the same legal positions that he has entertained. We certainly will be seeking the same result.

The **Chairman**. Which is not to dismiss the independent counsel?

Attorney General **Meese**. Which is to dismiss the suit against the independent counsel.

The **Chairman**. All right. Fine. And last week in the *Deaver* case, a Federal district court judge issued a temporary restraining order against the issuance of an indictment against Mr. Deaver on four counts of perjury. A hearing on that restraining order is set for Wednesday. Will you participate in that case or will your department participate in that case?

Attorney General **Meese**. We are not a party to that lawsuit and probably will not participate.

The **Chairman**. Now, let me shift if I may to a new subject. I would like to talk with you about one of your favorite subjects, *Miranda*. Despite the frequent exhortations of *Miranda*, you have in the past stated "we are not advocating any specific change."

Now, does the release 2 weeks ago of the report by the Assistant Attorney General for Legal Policy calling for a concerted legal strategy to overturn *Miranda* represent the policy of the department, that is, have you finally decided to seek an appropriate case in which to seek to overturn *Miranda*?

Attorney General **Meese**. We have not made such a decision, no.

The CHAIRMAN. So the report by the Assistant Attorney General at this moment is not the Justice Department's position?

Attorney General MEESE. The report was a series of recommendations and also a very scholarly study of the whole subject of *Miranda.* Obviously, if we found a case that was of such a nature that we would have to seek this in order to represent properly the position of the department in a case, we would do so, but I have not seen such a case come up. We are not trying to manufacture some situation for the court.

Actually, the trend of the court now is to limit *Miranda* and to be sure that either exceptions are found or the *Miranda* decision is not extended, because I think the court as well as many scholars, and certainly most law enforcement officials throughout the country, realize the problems with *Miranda.*

The CHAIRMAN. Well, you must be talking to different law enforcement officials than I, including the head of the FBI, who said yesterday, "I would find it difficult to say that this has been a significant obstruction of effective law enforcement," and he went on. That is a quote from Judge Webster yesterday, and I have not found, and I invite comment from the various police agencies with whom I have worked closely over the years, they do not, I have not seen any ground swell to suggest that *Miranda* is an impediment to their ability to do their job.

Attorney General MEESE. I am sure, Senator, you do talk to different people because I have received numerous letters from law enforcement associations, chiefs of police associations, comments from the International Association of Chiefs of Police, saying that *Miranda* is a problem; that it is a bad decision and supporting basically the position that I have taken, that while we do want to balance the rights of criminal suspects against those of ascertaining truth in the courtroom, this imbalance that was created by *Miranda* is a bad thing for the general public. I would be happy to send you copies of the numerous letters that I have received.

The CHAIRMAN. I would appreciate that very much. As I understand it, one of the reasons for your opposition to *Miranda* is that you believe the rules are too complicated for the police to follow. However, Rudolph Giuliani, the U.S. Attorney in New York, was recently quoted in the Washington Post as supporting *Miranda* when he said, "Miranda is not something we should be contesting. If you want people to waive their rights, it is equitable that they know what their rights are. Everybody understands *Miranda.* It is easy to apply, it works well."

Now, Mr. Giuliani is probably as of late one of the most successful and brilliant conviction rates against people you have all been working on for a long time. Now, what is your disagreement with Mr. Giuliani's view that *Miranda's* bright line rule does not work so well in the field?

Attorney General MEESE. Well, I think one of the things that you have is the Federal jurisdiction has always had a comparable warning to *Miranda* since 1910 in the *Weeks* case, so it is a different situation. I am talking about the—I am not talking about Mafia cases. The Mafia knows their rights better than anybody and warning them of it doesn't really make that much difference one way or the other.

I am talking about the three situations, and I have no objection to the warning, a properly phrased warning. I think that the problem with *Miranda* is three-fold: First of all, it does interfere with legitimate police investigation, because in many cases a police officer, not in a Federal case but in a local case, a police officer on the scene needs to know what in fact happened, where the gun is, and things like this that would be a normal part of his investigation, and the *Miranda* decision——

The Chairman. How does it differ from a Federal police official? I do not want to interrupt you, but how is that different than the need that exists for a Federal law enforcement official?

Attorney General Meese. Because a Federal law enforcement officer deals with entirely different types of investigations. They rarely get involved in murders, rapes, robberies, and those kinds of investigations. They are usually dealing with organized crime, economic crime, drug investigations, and so on. It is an entirely different type of investigation sequence as to what happens.

But as far as the local police, they have a different situation where they come upon different types of scenes. The point I am making is the first problem is it interferes with legitimate police investigation. The second thing is the *Miranda* decision has provided confusion to the process, because of its intricacies. It certainly is hard to keep up with the decisions when over the history of the application of it you have courts creating new loopholes by which confessions or statements that have been made, even when the *Miranda* warning is given, have been thrown out by the courts.

We have had one anomaly recently in one State where all the warnings were given and the court still threw out the statement on the basis that the police were too nice to the suspect and therefore lured him into a false sense of security, whereupon he confessed.

A third situation is that it prohibits the prosecution from asking a defendant when he makes up a story to counteract the evidence that has been produced at trial why he did not give that same statement at the time that he was originally apprehended by the police. So there are a lot of reasons that *Miranda* causes problems.

My view is we can do better. The ostensible purpose of the *Miranda* decision, as written by Chief Justice Warren, was to deter police misconduct. I believe that there are better ways in this technological age to be sure that there is no police misconduct, whether it is videotaping statements or whether it is having a lawyer present, there are a lot of other things that we could do which I feel would be more appropriate than some of the excesses of *Miranda* which has interfered with ascertaining the truth.

The Chairman. General, if you are worried about the policeman not being able to ask about where the gun is when he is on the scene and you are looking for technological ways to supplant it by making sure that you have a video camera, I mean it seems to me that that is a bit of a red herring.

Attorney General Meese. Not at all. Not at all. I think that the problems of *Miranda* have been well recognized as clearly as when Congress passed a statute in effect undoing *Miranda*, which it did in 1968.

The Chairman. I think the overwhelming body of evidence is to the contrary, but let me move on——

Attorney General MEESE. I would respectfully disagree.

The CHAIRMAN. I imagine we are going to have a chance to do that for a while.

Philip Hyman, former Assistant Attorney General for the Criminal Division, says, "Every hardened criminal, every career offender, every member of the criminal organization knows his rights and isn't about to confess. The whole universe affected by *Miranda* are first-time offenders, and of them only those that are poor, ignorant and unassertive, and of them a large percentage have always waived the *Miranda* rights and confessed anyway."

Now, do you agree that educated people like you and others and also career criminals know their rights and assert them, but the poor and the young and the first-time offenders are not as aware of their rights? Do you agree with that assertion? You said the Mafia obviously know their rights, so obviously they are not going to waive their rights anyway, they do not need a *Miranda* ruling. So obviously it seems to me—I should put it in the form of a question—is not *Miranda* designed to protect the less educated, the less well-informed, the younger, the first-time offenders to the same rights that the Mafia chief has?

Attorney General MEESE. I think the question, Senator, is how do you get at the truth, how do you get at the facts, how do you remove artificial barriers from having all the truth be known, and I think that is really the more important question as to whether they are first-time offenders or not first-time offenders. I think that everybody should obviously know and be fully entitled to their rights. The question is should there be a right to with impunity not answer questions at the time that a person is apprehended by the police and then be able to weave a story at the time of trial which is totally different or which for the first time makes up a lot of excuses and then not be able to be cross-examined on that fact.

The CHAIRMAN. I do not know how we grant that right to a Mafia chief and not to some kid who is picked up for a first-time offense for something, but——

Attorney General MEESE. Well, rights are not supposed to be ways in which guilty people escape justice. Rights are supposed to be ways in which we ascertain the truth without trampling upon basic human institutions, and I think that the idea of creating an artificial loophole or an artificial barrier to ascertaining the truth is not a right, it is a means really in which injustice is more prevalent than justice.

The CHAIRMAN. We have a thing called the right against self-incrimination and that by definition may stand between a guilty person and his or her conviction, but under this Constitution we have concluded that even a guilty person has a right under our system not to be put in the position to in-criminate themselves, so I would argue with the basic premise.

Attorney General MEESE. And certainly I agree with that, and I would not want any person to be put into a position of incriminating themselves, but remember that the Fifth Amendment never applied to this type of pre-courtroom situation.

The CHAIRMAN. But the principle which you state is that—well, my time is up, I will come back to it. I am trespassing on the time of my friend from Utah.

Senator HATCH. Thank you, Mr. Chairman.

Ed, I know that you probably have to leave pretty soon, so I will try to make mine brief.

The CHAIRMAN. He has at least another 40 minutes he said, 12:30.

Attorney General MEESE. No, 12:15.

Senator HATCH. Well, let me just ask a few. The Supreme Court rejected the underlying rationale in the *Miranda* decision in *Michigan* v. *Tucker*. I think you are familiar with that case where the Court held that no violation of the Fifth Amendment occurs if the statements are obtained from a suspect without observing *Miranda's* rules or any other safeguards, so long as actual coercion is avoided. You are familiar with that case?

Attorney General MEESE. Yes, I am.

Senator HATCH. So the Court has already decided cases supporting the position that you have taken.

Attorney General MEESE. As I mentioned earlier, Senator, I think the trend in the Court has been away from the original holding in *Miranda*.

Senator HATCH. You are absolutely right, and that view has been reiterated in at least two subsequent cases, the *Quarles* case, *New York* v. *Quarles* and *Oregon* v. *Elstad*, is that correct?

Attorney General MEESE. That is correct.

Senator HATCH. And those cases were decided in 1984 and 1985, respectively, and this is by a Court that under anybody's definition could be determined a Reagan court. Would that be fair to say?

Attorney General MEESE. Yes, it would, Senator. For reasons I mentioned earlier, the *Miranda* decision has defects which the Court has tried to correct as the appropriate cases have come up.

Senator HATCH. What you are saying is *Miranda* has been used to circumvent adequate prosecution under certain circumstances and it should not be used for that purpose. It should be used to protect legitimate constitutional rights.

Attorney General MEESE. I think that it is appropriate for full rights of a defendant to be protected. I think this can be done without interfering with the ascertainment of the truth.

Senator HATCH. I would just bring out that Congress itself repudiated the *Miranda* decision in 1968 by enacting 18 U.S. Code 3501, which restores the pre-Miranda voluntariness standard for the admission of confessions in Federal prosecutions. Given the Court's present disposition, It is reasonable to assume that the court would uphold that statute and overrule *Miranda* itself. Is that a fair statement?

Attorney General MEESE. I would agree, Senator.

Senator HATCH. You know, we talk an awful lot about civil liberties, but we talk very little about responsibilities in our society. We all love to talk about liberties, we all like to talk about rights, but we do not talk about responsibilities very much. It seems to me you are saying that we have to worry about that other side of the ledger as well, the responsibility side; we have to worry about the victims of society. I just wanted to point this out because I think the Court is moving in your direction. Frankly, what a lot of our people here on Capitol Hill do not like, and some on this committee, is that the court is moving in the direction of recognizing the rights of victims.

Well, let me just bring up one other question. The administration has been criticized quite a bit as a result of what some think is its failure to appoint women and minorities to the bench. Would you care to comment on that?

Attorney General **Meese**. Senator, I think that if you look at our record, with the exception of the last administration which made race and sex conscious decisions in their appointment of judges, that our administration will hold up well against any previous administration in this regard.

Senator **Hatch**. I agree with that. I think the statistics would show that. You have appointed, as I understand it, 26 women and minorities at or above the GS-15 level to presidential political positions. And there have been 17 minorities and 28 women who have been nominated by the Reagan administration for judicial appointments. Is that correct?

Attorney General **Meese**. That is correct.

Senator **Hatch**. And you are saying that this ratio is representative of every other administration except possibly the Carter administration, where they made sex and race criterion a focal point of the administration.

Attorney General **Meese**. Yes, it would.

Senator **Hatch**. I think merit has to be the primary criterion in filling these particular positions. As I understand it, other than the few furors that have been raised up here on Capitol Hill, all of your judicial nominees have gone through.

Attorney General **Meese**. They have. I think we have tried to bring to the judiciary an outstanding group of nominees and ultimately appointments, and I think this is generally the feeling in the legal circles and among the judges themselves.

Senator **Hatch**. Thank you. That is all I have because I know you have to go.

The **Chairman**. Before I yield to my colleague, just let me remind you of the *Elstad* case in 1985, where Justice O'Connor said, "When police ask questions on the subject of suspects in custody without administering the required warning, *Miranda* dictates that the answers received be presumed cancelled and that they be excluded from evidence at trial in the State's case in chief. The Court today in no way retreats from the bright line rule of *Miranda*," and they went out of their way to make that case and make that point.

By the way, I am tempted to ask you, I am almost kidding—maybe I should not be—well, how did you like Scalia's decision? It just goes to show, it seems to me, that we can never figure out how a judge is going to rule once you put those robes on, does it not or does it, Scalia's recent decision when he wrote for the majority?

Attorney General **Meese**. I have not read the decision yet. It came down yesterday.

The **Chairman**. I think you will love it. I know I liked it. [Laughter.]

I will yield to my colleague.

Attorney General **Meese**. In other words, you love it whenever a criminal case is reversed, is that it?

The CHAIRMAN. I love it when the Constitution is upheld and a judge who has been appointed to the Court demonstrates that they have gone to the Court without ideological baggage and have an open mind, and that is what I like about Scalia.

Attorney General MEESE. Well, that is why he was selected, because we knew he would have those qualities.

The CHAIRMAN. And I am delighted when you hit one on the nose.

Senator SIMON. On that note of unity, let me commend you, General, I know that you played a part in the selection of Howard Baker and Judge Webster, and I think both are significant contributions to the Presidency and to the Nation.

Let me if I may follow on the question of my colleague from Utah, because I have seen statistics particularly at the Court of Appeals level, and that is really the level where the administration makes the choices for judges that are frankly appreciably less comforting than the statistics cited here.

Also I have been advised—and I would appreciate your correcting me—that there are at the present time in the top 21 positions in the Justice Department, that there are no women, blacks or Hispanics in the top 21. Is that correct or not?

Attorney General MEESE. I would have to check. At the present time I know I have appointed blacks, we have had women. Unfortunately, we have some vacancies right now because some of those—it just happens that people in each of those categories that you mentioned have either died or have resigned in recent months.

Senator SIMON. But as far as——

Attorney General MEESE. I do know that we have women in the top positions in the department. I know we have blacks in the top positions, and I know we have Hispanics either in positions or under consideration for appointments, so I would have to check.

Senator SIMON. But in the top 21—and I see you have staff people here—am I advised correctly that there are no blacks, women, Hispanics in the top 21?

Attorney General MEESE. I would have to find that out and I would be happy to tell you.

Senator SIMON. I guess you have people here who could help you——

Attorney General MEESE. I am not testifying here, so I will be happy to find out and let you know.

Senator SIMON. Okay. And we will let the world know the answer on that one.

Let me follow through on something my colleague, Senator Metzenbaum, said, that the perception of what is happening on the special counsel is important, and that is why I was pleased to hear you say you will be going in against the petition of Col. North. Just by way of general background, when you asked for these special counsel, did you have reservations about the constitutionality of the law under which you were making the request at that point?

Attorney General MEESE. You are referring to the independent counsel, under that statute?

Senator SIMON. That is correct.

Attorney General MEESE. There has been a position—there have been a number of questions raised over the years since 1978 when the statute was originally passed by attorneys in this administration and in the previous administration about the constitutionality of the Act. There have been a number of questions raised by legal commentators about the constitutionality, so that that is always kind of a spectre lurking in background of this Act.

We have followed the law because unless and until there is a declaration by a court to the contrary, we follow the law obviously, and so that is the basis for our utilizing that statute and seeking independent counsel in appropriate cases.

Senator SIMON. It would be reassuring I think to some people in the American public, because these cases are now pending, if you were to simply say in the event there is a court decision—for example, either Mr. Walsh or Mr. Seymour, et al.—that you would ask them to serve as special prosecutors for the Justice Department. Have you considered that possibility or are you willing to make that kind of a statement?

Attorney General MEESE. Yes, I have, Senator. We have certainly considered that as one of the strategies. I have already said, perhaps while you were not here, that I am absolutely committed to insuring that these independent counsel be able to continue their activities, and so that we would take whatever steps are necessary and lawful to do that, including the suggestion you make.

Senator SIMON. I have no further questions.

Attorney General MEESE. In that case, I thank you for your courtesy.

Senator SIMON. The Chairman is on the phone. If you will wait just a moment, General——

Attorney General MEESE. I will be happy to wait until the Chairman returns.

Senator SIMON. All right. My guess is he will be back here momentarily. While you are waiting, you might consult with your staff to see if any of the 21 top people are either women, blacks or Hispanics.

Attorney General MEESE. I do know we have some under consideration for appointment at the present time.

Senator SIMON. All right.

The CHAIRMAN. We have a few more minutes. I promise you that you will get out of here at quarter after. I would like to ask you a few more questions, if I may. We are not going to be able to get through this, but I would like to get into it, and that is the whole drug coordination issue.

General, the coordination of our drug control program is, as I think we both agree, more important now than it ever has been and I think you have made some progress there. I compliment you on that.

Congress has recently provided a major infusion of money and enacted some tough statutes to strengthen our drug control program, and now it is essential it seems to me that there be a clear leadership and coordination in carrying out our expanded program. I know you believe that exists now, but let me read a quote to you from the President's Commission on Organized Crime. It says:

> Jurisdictional disputes between the agencies are the most serious obstacles to success in the struggle against drug trafficking. The personnel of each federal agency involved, from the Chief Executive to the newest employee, must understand that

> their agency alone cannot solve the nation's drug problem. Acceptance of this reality will go a long way in eliminating the destructive competition that in the past has hampered federal law enforcement.

The commission then went on to say that the role of the existing coordinating mechanism, the National Drug Enforcement Policy Board, was "ambiguous," saying that it "failed to assert a clear leadership role." By the way, that is an example of the current structure. We will not try to go into it now, but I think the chart is fairly illustrative, just from the number of lines on it, of the Federal drug policy coordination process.

Now, how will the problems pointed out by the President's commission be resolved by the new executive order?

Attorney General MEESE. First of all, you recognize that what you quoted from the President's commission is data that is over two years old.

The CHAIRMAN. Yes, I understand.

Attorney General MEESE. Second, the policy coordination you have on the chart is not an accurate portrayal of the present structure. However, the way in which——

The CHAIRMAN. Is it less cluttered than that?

Attorney General MEESE. Much less. The way in which the National Drug Policy Board will be operating is to have a very simple structure in which you have a single Cabinet level body that has the overall responsibility for coordinating all aspects of both the enforcement and the prevention and health aspects of the drug situation. Under the Board there are two coordinating groups, one for health and prevention, the other for enforcement, and that they have total responsibility for the day-to-day coordination in their spheres.

You have a number of projects such as the National Narcotic Border Interdiction System, you have Operation Alliance and a number of other things, but they all fall within the purview of that enforcement coordination.

The CHAIRMAN. When you say "in the purview," does that enforcement of coordination have jurisdiction over the interdiction system, or is that located outside?

Attorney General MEESE. No, that is part of the coordinating group's responsibilities.

The CHAIRMAN. And how about the Vice President's function?

Attorney General MEESE. The Vice President oversees but is not a day-to-day participant in the National Narcotics Border Interdiction System. He is the Chairman who chairs the group, but the actual functions at the Cabinet level are carried on by the National Drug Policy Board.

The CHAIRMAN. Who makes the—does that Drug Policy Board sit down and make judgments as to what the overall allocation of resources will be and prioritize them and what targets you are going to move to?

Attorney General MEESE. Yes, they do.

The CHAIRMAN. They do do that. And do the various—even though that may have changed some, still most of those folks are still involved somewhere along the line——

Attorney General MEESE. The people are involved but the coordinating mechanism is different.

The CHAIRMAN. Do they actually come before——

Attorney General MEESE. As a matter of fact, I have just seen that there is a second page of this and what we have in essence is similar, with some different components than what is suggested in your structure.

The CHAIRMAN. So it is similar to that?

Attorney General MEESE. Yes.

The CHAIRMAN. Well, in——

Attorney General MEESE. Except I think it is perhaps more effective, because we eliminate one layer of bureaucracy.

The CHAIRMAN. I see. So, what I am proposing, which is on the chart there is something you suggest is similar. And what layer of bureaucracy do you eliminate?

Attorney General MEESE. You have there a Director of the National Office of Drug Policy, that would be in addition to the present Cabinet members and we do not feel that is necessary.

The CHAIRMAN. But we eliminate the board. Let me ask you, the way the board functions—and I realize that we are getting close to your time, there is only 5 minutes left—but the way the board presently functions, do each of the departments that have budgetary requests come before that board and make their request? Does the board as a whole make a judgment?

Attorney General MEESE. The Cabinet departments that have drug functions submit simultaneously, with their submission to OMB each year during the budget cycle, that same information to the board. The board then looks over that information. Previous to that the board has already made some determinations as to priorities and where the money ought to go, as well as an evaluation of past allocation of resources, and then makes recommendations to the President as to how the resources should be allocated as a part of the budget process.

The CHAIRMAN. It sounds like it is moving, but let me ask you a specific question: The budget cuts over the next two years on the State and local piece for drug enforcement, did the board vote on that? Did they say——

Attorney General MEESE. I do not know that they voted on it, but it was discussed with the board and I think there was unanimous feeling that the money should have gone as it has in the President's budget to Federal law enforcement, rather than a bunch of grant programs.

The CHAIRMAN. So that is something that—and tell us again for the record who chairs that board?

Attorney General MEESE. I chair it, as the Attorney General.

The CHAIRMAN. And so if you have a judgment, such as you did, that it should not go State and local, it should go Federal, with limited resources, as you say, what is the mechanism if individual representatives on that board disagree with that judgment, how is that articulated?

Attorney General MEESE. Well, if they disagreed they could certainly make that representation to the President if they disagreed, or they would ask that in the discussions with the President on behalf of the board I would rate that. They could ask me to make that representation as, in effect, a minority report. We have not had any such minority reports on any issue that I know of.

The **Chairman**. Now, one last question and then with your subordinates we will follow this up in much more detail, but is that how you do the budgeting within the Justice Department, you have a whole series of agencies, sub-agencies that you have to deal with, everything from the FBI to DEA. How do you determine what the Justice Department's budget will be, separate and apart from the drug coordination policy? Does it work the same way?

Attorney General **Meese**. We have what we call a department resources board, which is chaired by my deputy, before whom all of the proposals for budget items are presented and they in effect work up their recommendations for me for the budget.

The **Chairman**. Now, why does it—so then what you are suggesting is that the various proposals for application of resources in the war on drugs will be made before that committee of the whole at some point, that Drug Policy Board? Is that right?

Attorney General **Meese**. They review them, yes.

The **Chairman**. Who are they made to first? Do they go to OMB first?

Attorney General **Meese**. They would go to OMB simultaneously in coming to us.

The **Chairman**. Well, the time is up, you have to go. I would like to submit additional questions in writing, some of which relate to the whole question about the break-ins that we discussed yesterday with Judge Webster, the drug coordination, also on the fair housing legislation which some of us, myself in particular, feel very strongly about, and a few other areas. There is not a lot, probably twenty questions or thereabouts. I would appreciate it if we could have your staff prepare you some answers.

Attorney General **Meese**. I would be happy to do that.

The **Chairman**. And Senator Leahy has several questions he would like to submit and they will be submitted to you and I hope you will answer those for the record, and tell Scotland Yard we said "hello."

Thank you very much for your time.

[Whereupon, at 12:15 p.m., the committee was adjourned, to reconvene subject to the Chair.]

APPENDIX

JOSEPH R BIDEN JR DELAWARE CHAIRMAN

EDWARD M KENNEDY MASSACHUSETTS
ROBERT C BYRD WEST VIRGINIA
HOWARD M METZENBAUM OHIO
DENNIS DeCONCINI ARIZONA
PATRICK J LEAHY VERMONT
HOWELL HEFLIN ALABAMA
PAUL SIMON ILLINOIS

STROM THURMOND SOUTH CAROLINA
ORRIN G HATCH UTAH
ALAN K SIMPSON WYOMING
CHARLES E GRASSLEY IOWA
ARLEN SPECTER PENNSYLVANIA
GORDON J HUMPHREY NEW HAMPSHIRE

MARK H GITENSTEIN CHIEF COUNSEL
DIANA HUFFMAN STAFF DIRECTOR
DENNIS W SHEDD MINORITY CHIEF COUNSEL

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

March 11, 1987

The Honorable Edwin Meese III
Attorney General
United States Department of Justice
10th Street & Constitution Avenue, N.W.
Washington, D.C. 20530

Dear General Meese:

I want to express my appreciation to you for your cooperation during the Committee's recent Department of Justice authorization hearings.

Enclosed you will find written questions that my colleagues and I would like you to answer for the record, as discussed during the hearings.

I request that your answers be supplied to the Committee by March 31, 1987 so that the Committee can consider the Department's authorization bill in a timely manner.

I thank you in advance for your continued cooperation.

Sincerely,

Joseph R. Biden, Jr.
Chairman

Enclosure

QUESTIONS SUBMITTED BY SENATOR JOSEPH BIDEN, CHAIRMAN

QUESTIONS PRESENTED TO ATTORNEY GENERAL EDWIN MEESE, III

CRIME AND DRUGS

QUESTION #1:

THE PRESIDENT CALLED FOR A "WAR ON DRUGS", YET THERE ARE PROPOSED CUTS OF FUNDS PROVIDED IN THE 1986 OMNIBUS DRUG BILL WHICH IN EFFECT MAKES IT A ONE-YEAR WAR. DIDN'T THE PRESIDENT MAKE A COMMITMENT TO PROVIDE THESE FUNDS WHEN HE SIGNED THE DRUG BILL, WHICH INCLUDED A THREE-YEAR AUTHORIZATION FOR THESE PROGRAMS?

QUESTION #2:

THE STRATEGY REPORT RELEASED BY THE DRUG ENFORCEMENT POLICY BOARD PROVIDES AN ANALYSIS, FOR THE FIRST TIME, OF WHERE OUR FEDERAL DOLLARS ARE BEING SPENT. DOES THE REPORT CONTAIN FUTURE PROJECTIONS FOR RESOURCE AN BUDGET ALLOCATIONS?

FOLLOW-UP QUESTION #1:

WHEN ASKED WHETHER OF NOT OUR DRUG STRATEGY IS WORKING, YOU CITE IMPRESSIVE SEIZURE STATISTICS AND A RECORD NUMBER OF ARRESTS. SEIZURES AND ARRESTS ARE IMPORTANT, BUT THE REAL GOAL IS DECREASING USAGE. SHOULDN'T WE BE DEVELOPING LONG TERM GOALS BASED ON PRICE, AVAILABILITY AND CONSUMPTION, AND SETTING TARGETS TWO, FIVE AND TEN YEARS DOWN THE ROAD SO WE COULD LATER DETERMINE WHETHER WE ARE MOVING FORWARD?

FOLLOW-UP QUESTION #2:

YOU STATED "ENFORCEMENT ALONE WOULD NOT SOLVE THE (DRUG) PROBLEM. REDUCTION IN DEMAND IS AN ESSENTIAL COMPONENT IN WINNING THE WAR AGAINST DRUGS." YOU LISTED THE NEAR TRIPLING IN THE DRUG ENFORCEMENT BUDGET IN THE LAST SIX UEARS AS ONE OF THE MAJOR ACCOMPLISHMENTS OF THIS ADMINISTRATION IN RELATION TO DRUG ABUSE. SIX YEARS FROM NOW, SHOULD WE BE LISTING A TRIPLING IN THE DRUG ABUSE EDUCATION BUDGET AS ONE OF OUR MAJOR ACCOMPLISHMENTS?

FOLLOW-UP QUESTION #3:

YOU HAVE ALSO STATED THAT CONGRESS AND OTHER OFFICIALS WHO HAVE CRITICIZED THE DRUG BUDGET EITHER MISUNDERSTAND THE NUMBERS OR THEY ARE PLAYING POLITICS WITH THIS ISSUE. YET DESPITE YOUR STATEMENTS ABOUT DEMAND REDUCTION, THE PRESIDENT'S BUDGET PROPOSES TO CUT EDUCATION FUNDING BY $150 MILLION FROM

THE LEVEL AUTHORIZED JUST LAST OCTOBER. GIVEN THE PRIORITY OF EDUCATING OUR CHILDREN, WHY ARE WE CUTTING THESE FUNDS?

CIVIL RIGHTS

QUESTION:

IN THE FISCAL 1988 BUDGET, THE CRIMINAL PROSECUTION OF CIVIL RIGHTS VIOLATIONS IS LISTED AS THE NUMBER ONE PRIORITY OF THE CIVIL RIGHTS DIVISION, YET VICIOUS INCIDENTS OF RACIAL VIOLENCE AND INTIMIDATION ARE APPARENTLY ON THE RISE. HOW DO YOU EXPLAIN THIS APPARENT INCREASE IN RACIAL VIOLENCE, AND WHAT STEPS DOES THE JUSTICE DEPARTMENT INTEND TO TAKE IN RESPONSE?

FOLLOW-UP QUESTION A:

HOW MANY INCIDENTS OF RACIAL VIOLENCE OCCURRED IN 1986 COMPARED TO 1985?

FOLLOW-UP QUESTION B:

HOW MANY SUCH INCIDENTS OCCURRED IN 1985 COMPARED TO 1984?

FOLLOW-UP QUESTION C:

DO YOU KNOW HOW MANY INCIDENTS OF RACIAL VIOLENCE OCCURRED DURING THE FIRST FOUR YEARS OF THE REAGAN ADMINISTRATION COMPARED TO DURING THE FOUR YEARS OF THE CARTER ADMINISTRATION?

FOLLOW-UP QUESTION D:

AS PART OF THE UNIFORM CRIME REPORT, DOES THE JUSTICE DEPARTMENT KEEP STATISTICS ON INCIDENTS OF RACIAL VIOLENCE?

FOLLOW-UP QUESTION E:

GIVEN THE HEINOUS NATURE OF SUCH CRIMES AND THE DIVISIVE EFFECT THEY HAVE ON OUR SOCIETY -- AND IF PREVENTING THEM IS A JUSTICE DEPARTMENT PRIORITY -- SHOULDN'T YOU KEEP STATISTICS ON THEM?

FOLLOW-UP QUESTION F:

HOW CAN YOU EFFECTIVELY COMBAT RACIAL VIOLENCE IF YOU DON'T EVEN HAVE AN ACCURATE PICTURE OF ITS EXTENT AND LOCATION?

ANTI-TRUST

QUESTION #1:

AMONG THE JUSTICE DEPARTMENT'S MANY ACTIVITIES, HOW IMPORTANT TO YOU IS ENFORCEMENT OF OUR ANTI-TRUST LAWS?

FOLLOW-UP QUESTION A:

IF ANTI-TRUST ENFORCEMENT IS SO IMPORTANT TO YOU, THEN WHY IS IT THAT THE POSITION OF ASSISTANT ATTORNEY GENERAL FOR ANTITRUST HAS BEEN VACANT FOR ALMOST HALF OF THE TIME THAT YOU HAVE SERVED AS ATTORNEY GENERAL?

FOLLOW-UP QUESTION B:

WHEN DO YOU EXPECT TO SEND A NOMINATION FOR THE ANTI-TRUST DIVISION TO THE SENATE? DON'T YOU ANTICIPATE THERE WILL BE PROBLEMS GETTING SOMEONE QUALIFIED TO SERVE IF YOU WAIT MUCH LONGER?

QUESTION #2:

THE BUDGET SUBMITTED BY THE DEPARTMENT OF JUSTICE INCLUDES A CUT OF 100 POSITIONS ($2.1 MILLION) FOR THE ANTI-TRUST DIVISION AND THE PRESS RELEASE ISSUED JANUARY 5 INDICATES THAT THESE SAVINGS ARE POSSIBLE BECAUSE OF "IMPROVED EFFICIENCY", "REALIGNMENT OF POLICY AND SUPPORT FUNCTIONS", AND "CURTAILMENT OF CERTAIN LOWER PRIORITY ACTIVITIES". COULD YOU EXPLAIN WHAT IS MEANT BY THOSE DESCRIPTIVE PHRASES?

FOLLOW-UP QUESTION:

WHAT KIND OF POSITIONS ARE BEING CUT? ARE THESE LINE ATTORNEYS? ARE ALL THE POSITIONS IN WASHINGTON OR ARE MANY OF THESE POSITIONS IN THE FIELD OFFICES?

FY 1988 AUTHORIZATION BILL:

QUESTION #1:

THE LAST ENACTED AUTHORIZATION WAS FOR FISCAL YEAR 1980. COULD YOU COMMENT ON THE DIFFICULTIES THAT THE DEPARTMENT FACES, AND PARTICULARLY LAW ENFORCEMENT AGENCIES BECAUSE OF THE UNCERTAINTY OF THE DEPARTMENT'S AUTHORITY LAPSING OR NOT BEING UPDATED?

FOLLOW-UP QUESTION:

AS YOU PROPOSE IN YOUR AUTHORIZATION BILL, THERE ARE A NUMBER OF ROUTINE ACTIVITIES THAT COULD BE MADE A PART OF A PERMANENT AUTHORIZATION STATUTE AND COULD NOT BE PART OF THE TRADITIONAL AUTHORIZATION PROCESS. I WOULD ALSO LIKE TO CONSIDER A TWO YEAR AUTHORIZATION. THIS WOULD HELP MEET THE COMPRESSED TIME SCHEDULE WE NOW HAVE FOR AUTHORIZING AND APPROPRIATING FUNDS UNDER THE GRAMM-RUDMAN-HOLLINGS PROVISIONS. THIS MAY REQUIRE SOME ADDITIONAL REPORTING TO CONGRESS ON YOUR ACTIVITIES, BUT DON'T YOU AGREE THAT IT WOULD GIVE YOU A CLEARER INDICATION OF YOUR AUTHORITIES FOR PLANNING AND MANAGEMENT PURPOSES?

ADDITIONAL QUESTIONS

QUESTION A:

IN MARCH OF 1986, THE GENERAL ACCOUNTING OFFICE RELEASED A DETAILED REPORT ON THE PROBLEMS THE JUSTICE HAS BEEN HAVING WITH MANAGEMENT AND OPERATIONS AND INCLUDED RECOMMENDATIONS FOR IMPROVEMENTS -- ONE OF WHICH CREATES A POSITION OF INSPECTOR GENERAL FOR THE DEPARTMENT. AFTER TEN MONTHS REVIEW DO YOU NOW ENDORSE ANY OF THE RECOMMENDATIONS, AND IF NOT, WHAT PROPOSALS HAS THE DEPARTMENT FORMULATED TO ADDRESS THESE PROBLEMS?

QUESTION B:

THE DEPARTMENT HAS HAD CONSISTENT PROBLEMS UPDATING ITS INFORMATION SYSTEMS. DOES JUSTICE FINALLY HAVE A PLAN FOR A LONG TERM INFORMATION SYSTEMS MANAGEMENT? HAVE YOU SUBMITTED THIS PLAN TO OMB FOR REVIEW?

QUESTION C:

THE DEPARTMENT IS REQUESTING AN INCREASE OF $50 MILLION FOR LITIGATION RESOURCES FOR VARIOUS DIVISIONS BASED ON, FOR THE MOST PART, CASE LOAD INFORMATION IN THE BUDGET DOCUMENT. GAO AND OMB HAVE NOTED THAT POOR RECORD KEEPING HAS RESULTED IN DOUBLE AND TRIPLE COUNTING OF CASES, THEREBY OVERSTATING JUSTICE'S LITIGATION WORK LOAD. WHAT SPECIFIC STEPS HAVE BEEN TAKEN TO CORRECT THESE PROBLEMS?

QUESTION D:

THE JUSTICE DEPARTMENT'S PROPOSED AUTHORIZATION BILL FOR FY 1988 REQUIRES VERY LITTLE IN THE WAY OF REPORTING REQUIREMENTS FOR UNDERCOVER OPERATIONS. IF CONGRESS GRANTED TEH DEPARTMENT PERMANENT UNDERCOVER AUTHORITY, WOULD YOU SUPPORT ADDITIONAL OVERSIGHT REPORTING REQUIREMENTS?

QUESTION E:

BOTH THE FBI AND THE MARSHALS SERVICE HAVE RESPONSIBILITY FOR FEDERAL EFFORTS TO APPREHEND FUGITIVES. THERE HAS BEEN DISCUSSIONS AND STUDIES WHETHER THE PROGRAM SHOULD BE TRANSFERRED TO THE MARSHALS SERVICE OR TO THE FBI. HAS THE DEPRTMENT REACHED A FORMAL POSITION BOUT THE DISTRIBUTION OF THIS RESPONSIBILITY?

CRIMINAL FINES

QUESTION:

IN 1984, CONGRESS PASSED THE "CRIMINAL FINE ENFORCEMENT ACT" WHICH THE DEPARTMENT SAID IT NEEDED TO ENHANCE THE COLLECTION OF CRIMINAL FINES AND SUBSTANTIALLY INCREASED THE

LEVEL OF VIRTUALL ALL CRIMINAL FINES. HOWEVER, COLLECTIONS HAVE SUBSTANTIALLY DROPPED SINCE THAT TIME -- WHY ARE WE STILL HAVING PROBLEMS?

FOLLOW-UP QUESTION #1:

A GAO STUDY PUBLISHED LAST JUNE INDICATED THAT ONLY 7% OF THE FINES IMPOSED IN CASES BROUGHT BY THE ORGANIZED CRIME/DRUG ENFORCEMENT TASK FORCES WERE COLLECTED. IS THE FINE COLLECTION PROBLEM UNIQUED TO THESE UNITS OR PART OF A MORE GENERAL PROBLEM OF FINE COLLECTIONS?

FOLLOW-UP QUESTION #2:

WE CREATED THE CRIME VICTIMS FUND IN THE 1984 CRIME BILL WITH STRONG SUPPORT FROM THE ADMINISTRATION, YET YOUR BUDGET PROPOSES TO LIMIT DISBURSEMENTS FROM THE FUND. IF BUDGET CONSTRAINTS ARE THE REASON, HOW CAN YOU JUSTIFY THESE CUTS WHEN WE WOULD HAVE ENOUGH MONEY IF YOUR DEPARTMENT WERE MORE AGGRESSIVE IN COLLECTING CRIMINAL FINES?

FORFEITURE

QUESTION:

AS PART OF THE 1984 CRIME BILL'S FORFEITURE PROVISIONS, WE INCLUDED A SECTION UNDER WHICH THE PROCEEDS FOR JOINT FEDERAL AND STATE/LOCAL FORFEITURE OPERATIONS WOULD BE SHARED. IN 1986, $505 MILLION IN ASSETS WERE SEIZED BUT LESS THAN 5%, A TOTAL OF OF $24 MILLION, WAS SHARED WITH STATE AND LOCAL AGENCIES -- WHY? DOES THIS INDICATE THAT COOPERATIVE SEIZURES ARE INFREQUENT OR ARE STATE AND LOCAL AGENIES NOT PLAYING A SIFNIFICANT ROLE IN SEIZURE OPERATIONS?

FOLLOW-UP QUESTION #1:

ONE OF THE PROBLEMS WITH SHARING FORFEITURE PROCEEDS IS THAT THE DEPARTMENT HAS BEEN DRAGGING ITS FEET IN PROCESSING APPLICATIONS -- WHY THE DELAY? HOW CAN FORFEITURE SHARING BE USED TO JUSTIFY CUTS IN GRANTS TO STATE AND LOCAL AGENCIES WHEN THE DEPARTMENT IS NOT EVEN TURNING OVER THESE ASSETS TO THESE AGENCIES?

FOLLOW-UP QUESTION #2:

THE MANAGEMENT SIDE OF THE DEPARTMENT'S FORFEITURE PROGRAMS HAS HAD PROBLEMS WITH MISUSE OF FUNDS AND IMPROPER TREATMENT OF PROPERTY, YET THE DEPARTMENT IS ASKING FOR AN INCREASE IN REIMBURSEMENT FOR EXPENSES TO THESE AGENCIES. HOW CAN WE BE SURE THAT WE ARE GETTING OUR MONEY'S WORTH FROM THE FUND'S EXPENDITURES?

DRUG COORDINATION

1. IN ITS REPORT RELEASED IN MARCH, 1986 THE PRESIDENT'S COMMISSION ON ORGANIZED CRIME STATED:

> JURISDICTIONAL DISPUTES BETWEEN AGENCIES ARE THE MOST SERIOUS OBSTACLES TO SUCCESS IN THE STRUGGLE AGAINST DRUG TRAFFICKING. THE PERSONNEL OF EACH FEDERAL AGENCY INVOLVED ... FROM THE CHIEF EXECUTIVE TO THE NEWEST EMPLOYEE, MUST UNDERSTAND THAT THEIR AGENCY ALONE CAN NOT SOLVE THE NATION'S DRUG PROBLEM. ACCEPTANCE OF THIS REALITY WILL GO A LONG WAY IN ELIMINATING THE DESTRUCTIVE COMPETITION THAT IN THE PAST HAS HAMPERED FEDERAL LAW ENFORCEMENT.

RECENTLY, THE PRESIDENT ANNOUNCED THAT HE WOULD ISSUE AN EXECUTIVE ORDER THAT WOULD REARRANGE THE FEDERAL DRUG CONTROL POLICY STRUCTURE.

> HOW WILL THAT ORDER HELP IN ELIMINATING THE AGENCY INFIGHTING THAT HAS UNDERMINED OUR DRUG CONTROL EFFORTS?
>
> WILL THIS ORDER GIVE YOU, AS CHAIRMAN OF THE NATIONAL DRUG POLICY BOARD, ANY ADDITIONAL AUTHORITY OVER THE DRUG CONTROL BUDGET PROCESS? OVER TASKING OTHER AGENCIES?

2. AT THE MARCH 4 HEARING, I PROVIDED YOU WITH A CHART DESCRIBING THE CURRENT DRUG POLICY STRUCTURE. AT THE TIME, YOU INDICATED THAT THE CHART WAS INACCURATE.

> CAN YOU TELL ME, SPECIFICALLY, HOW THE CHART WAS INACCURATE?

3. THE NATIONAL NARCOTICS BORDER INTERDICTION SYSTEM IS HEADED BY THE VICE-PRESIDENT. YET, YOU STATED ITS FUNCTIONS ARE COORDINATED BY THE DRUG ENFORCEMENT POLICY BOARD.

> CAN YOU EXPLAIN WHY NNBIS SHOULD BE HEADED BY THE VICE-PRESIDENT?
>
> WILL THE EXECUTIVE ORDER CHANGE THIS STRUCTURE?

4. THE WHITE HOUSE OFFICE OF DRUG ABUSE POLICY WAS CREATED TO COORDINATE THE FEDERAL DRUG ABUSE POLICY EFFORT. NOW THAT THE NATIONAL DRUG POLICY BOARD WILL ASSUME ALL DEMAND REDUCTION POLICY AUTHORITY, WILL THE WHITE HOUSE OFFICE BE ELIMINATED? WHAT NEED IS THERE TO CONTINUE THIS OFFICE UNDER THE NEW EXECUTIVE ORDER?

5. I HAVE PROPOSED ELIMINATING THE NATIONAL DRUG ENFORCEMENT POLICY BOARD, THE WHITE HOUSE OFFICE OF DRUG ABUSE POLICY, AND ARGUED THAT NNBIS SHOULD BE UNDER THE CONTROL OF ONE OFFICE, IN BOTH DAY-TO-DAY FUNCTIONS AND IN TERMS OF WHO IS IN CHARGE OF NNBIS. IN ITS PLACE, I WOULD CREATE ONE CABINET LEVEL OFFICE HEADED BY ONE PERSON.

> IN THE PAST YOU HAVE CHARGED THAT THIS COULD CREATE "MORE BUREAUCRACY." CAN YOU EXPLAIN YOUR PAST COMMENTS CONSIDERING THAT I HAVE PROPOSED THE ELIMINATION OF THREEE OFFICES OR BOARDS AND IN THEIR PLACE CHARGING ONE PERSON WITH DRUG CONTROL POLICY?

6. JUDGE WEBSTER, DIRECTOR OF THE FBI, TESTIFIED THAT THE FBI EMPLOYS AN INTERNAL BUDGET PROCESS THAT, IN EFFECT, REQUIRES HIS ASSISTANTS TO APPEAR BEFORE HIM AND JUSTIFY THEIR BUDGET REQUESTS. HE ALSO TESTIFIED THAT HE NEVER APPEARED BEFORE THE POLICY BOARD TO JUSTIFY THE FBI'S DRUG CONTROL BUDGET.

> CAN YOU TELL ME, SPECIFICALLY, WHAT THE NDEPB'S BUDGET REVIEW PROCESS ENTAILS?
>
> YOU STATED THAT THE BOARD APPROVED THE BUDGET CUTS IN THE FY 1988 BUDGET FOR STATE/LOCAL LAW ENFORCEMENT. WAS THERE EVER A VOTE OF THE BOARD ON THESE CUTS?
>
> ONCE SUBMITTED TO THE BOARD, CAN YOU TELL ME SPECIFICALLY WHAT CHANGES WERE MADE IN AGENCY BUDGETS FOR FY 1988 AND 1989 AS A RESULT OF THE BOARD'S BUDGET REVIEW PROCESS?

7. AS I UNDERSTAND IT, THE BOARD MAKES DECISIONS BY CONSENSUS. IS THIS TRUE?

> HOW CAN THE BOARD BE MAKING DIFFICULT RESOURCE AND STRATEGY DECISIONS IF THE ONLY DECISIONS THAT IT APPROVES ARE THOSE ON WHICH THEIR IS UNANIMITY?
>
> IS THIS THE WAY YOU RUN THE DEPARTMENT OF JUSTICE?

QUESTION FOR SENATOR BIDEN

Q: The Strategy Report released by the Drug Enforcement Policy Board provides an analysis, for the first time, of where our federal dollars are being spent. Does the report contain future projections for resource and budget allocations?

A: Appendix B of the Strategy contains budget outlay figures for the years 1981 thru 1988, both by agency and by strategy component, such as interdiction, investigations, intelligence, and so forth. This is the first time that such a composite picture has been constructed. The Policy Board will use this analysis as key input into future deliberations regarding resource and budget priorities beyond 1988.

The Strategy does not contain future projections for resource and budget allocations beyond FY 1988. However, it should be understood that the National Drug Policy Board plays a role in the budget process not only in reviewing agency submissions during the normal budget cycle, but also in more subtle and indirect ways by influencing the makeup of those submissions. Through its various subcommittees and working groups, the Board, its Coordinating Group, and Staff are constantly evaluating various policy and resource issues which, once resolved, will be reflected in appropriate budget submissions. Thus, the Board not only looks at the submissions once they are compiled, but intends to have considerable influence as to what is in them to begin with by making longer-term policy decisions.

QUESTION FROM SENATOR JOSEPH BIDEN

Question:

The President called for a "War on Drugs", yet there are proposed cuts of funds provided in the 1986 Omnibus Drug Bill which in effect makes it a one-year war. Didn't the President make a commitment to provide these funds when he signed the Drug Bill, which included a three-year authorization for these programs?

Answer:

During 1986, both the President and the Congress made it clear that illegal drug trafficking is a serious threat to the nation's internal safety and stability and that radical responses to the burgeoning drug problem were necessary. The Anti-Drug Abuse Act of 1986 and the companion Omnibus Drug Supplemental Appropriation Act of 1987 are a testimony to the determination and commitment needed to wage a "war on drugs".

The President's budget request for 1988 maintains the momentum begun in late 1986 in the Federal Government's drug law enforcement, prevention and treatment programs through the enactment of this significant legislation. Further, the magnitude of the 1988 request for anti-drug programs is proof that the Administration views this war as long-term in nature and not one year in duration.

In fact, the 1988 budget request represents an increase of 34 percent in funding for all Federal drug law enforcement, prevention and treatment programs over the level in 1986 from $2.270 billion to $3.033 billion. The 1988 Department of Justice budget requests substantial increases over 1987, including, for example, over 400 workyears for Drug Enforcement Administration programs in investigations, intelligence, foreign operations, ADP and technical support. Also, it includes 97 additional agents and support personnel for the Federal Bureau of Investigation's narcotics programs. The President's 1988 budget request provides an additional 417 positions for the U.S. Attorneys and an additional 800 new bed spaces to the Federal Prison System for drug violators. Clearly, the significant level of these increases for 1988 over 1987 reflects the President's commitment for the duration of the "war on drugs".

In terms of actual Federal Government outlays, the President's 1988 budget request proposes an increase from 1987 to 1988. This is because a number of the increases for the drug abuse prevention and treatment programs funded by the Omnibus Drug Supplemental Appropriation Act of 1987 will be spent over two years. A total of $75 million of the Department of Health and Human Services funding for drug abuse prevention and $177 million for drug abuse treatment will be spent over a two year time frame. Funding for other prevention and treatment programs drops from 1987 to 1988 due to first year start-up activities which should not recur in the base for the ensuing years. The Omnibus Drug Supplemental Appropriation Act of 1987 also included major capital purchases during 1987 for such items as radar balloons, aircraft, construction and other sorely needed enforcement equipment which need not be repeated in 1988. These legitimate actions all contribute to the drop in budget authority, but not in outlays between 1987 and 1988.

The President has proposed the termination of the State and Local Drug Grant Program authorized by the Anti-Drug Act of 1986 and funded by the Omnibus Drug Supplemental Appropriation Act of 1987. It is believed that the $225 million made available to State and local governments in 1987 will permit these units of government to significantly expand their efforts to enforce State and local drug laws. In times of fiscal constraint, the Administration must first utilize available funds to meet the requirements of the Federal justice system. This requires that State and local assistance programs formerly funded by the Federal Government be funded by the State and local jurisdiction which benefits from the programs. However, it is important to note that state and local governments will be receiving increased funds under the Assets Forfeiture program.

The details behind the President's 1988 budget for drug enforcement, prevention and treatment programs, include major resource increases over 1987 as well as legitimate program decreases. For the Federal Government as a whole, it reflects an increase of 147 percent in funding over a seven year period from 1981 to 1988. The President's 1988 request is one that will continue the intensity of the "war on drugs" and not just for one year, but over the long haul.

QUESTION FROM SENATOR BIDEN

Q: When asked whether or not our drug strategy is working, you cite impressive seizure statistics and a record number of arrests. Seizures and arrests are important, but the real goal is decreasing usage. Shouldn't we be developing long-term goals based on price, availability and consumption, and setting targets two, five, and ten years down the road so we could later determine whether we are moving forward?

A: We have set some goals along those lines, and are constantly striving to improve on that. The President was about as straightforward as one can be on that issue last summer when he unveiled his Drug-Free America Act. He said our ultimate goal is a drug-free society. We can't set a time frame on that; it is probably going to be an elusive goal for many years to come. But we need to keep marching toward it.

At this point, there are too many variables to permit us to set meaningful detailed targets, e.g., that we are going to force the price of cocaine up to $X in 1989, to $Y in 1993, and to $Z in 1997. We could pull numbers out of the air, but that would more likely harm than enhance our efforts, as price depends on a host of different factors: foreign production, international transshipment patterns, our interdiction success, our enforcement performance, domestic education, prevention and treatment efforts, and matters as unpredictable as future weather patterns in South America. Besides, prices can be affected not only by changes in supply but also by reductions in demand.

The Policy Board's Drug Law Enforcement Strategy, published in January, elaborates on this issue. That Strategy is intended to serve us in law enforcement for the next two years, and it sets a law enforcement goal of a measurable and sustained decline in drug abuse of all kinds. Throughout the Strategy document, there are sub-goals in the various components of the Strategy, and we will be tracking those. The Policy Board is developing now a Strategy Implementation Plan that will identify all of the things we will try to accomplish, and then monitor those various efforts and report periodically on the progress. There are sure to be some areas where we will not do quite as well as we thought we might; in other areas we will exceed our expectations. We will apply what we learn to the next strategy -- setting better goals and reaching more of them.

One thing that must be appreciated on this issue of setting goals in drug law enforcement is how difficult it can be, particularly in quantitative terms, to measure the progress we are making. For instance, an increase in price could reflect either an increase in use or a decrease in availability. Also, we are dealing with a criminal activity.

These people do not file commodity reports with us, and it is very difficult to get accurate estimates of the quantities of drugs being produced, trafficked, and consumed. It is a problem we are working on constantly -- to get better measures of performance.

QUESTION FROM SENATOR BIDEN

Q: You stated "Enforcement alone would not solve the drug problem. Reduction in demand is an essential component in winning the war against drugs." You listed the near tripling in the drug enforcement budget in the last years as one of the major accomplishments of this administration in relation to drug abuse. Six years from now, should we be listing a tripling in the drug abuse education budget as one of our major accomplishments?

A: Drug abuse prevention is an important element in fighting the overall drug problem, and we are devoting more resources to this important area as well. From a level of $133.9 million devoted to drug abuse prevention in FY 1981, the President's FY 1988 budget requests $321.4 million or nearly two and a half times the FY 1981 amount.

Many education and demand reduction efforts don't require a great deal of money. They are not capital intensive, and often depend largely on volunteers. We don't need to triple the funding in order to triple our efforts. We are hopeful that the increased resources and energy being devoted on both the supply and demand sides of the drug problems will provide a long-term success in the fight against drug abuse and trafficking.

QUESTION FROM SENATOR BIDEN

Q: You have also stated that Congress and other officials who have criticized the drug budget either misunderstand the numbers or are playing politics with this issue. Yet despite your statements about demand reduction, the President's budget proposes to cut education funding by $150 million from the level authorized last October. Given the priority of educating our children, why are we cutting these funds?

A: The President's Budget proposes an unprecedented Federal commitment to drug prevention in the nation's schools and communities. The Budget funds the new drug abuse education program for the duration of its three-year authorization -- at $200 million in FY 1987, and $100 million in each of the next two fiscal years. The $200 million appropriated for FY 1987 will finance non-recurring costs such as planning and purchases of materials, as well as basic program operations.

As in many Education programs that operate on a forward-funded cycle, considerable time will elapse between when funds are appropriated and when they are used at the local level. Local expenditures of Federal funds for drug education will be minimal in FY 1987 and will increase to a steady state level in FY 1988 and FY 1989. Thus, the FY 1988 request of $100 million should not lead to cutbacks in local programs.

QUESTION FROM SENATOR BIDEN

Q: The National Narcotics Border Interdiction System is headed by the Vice-President. Yet, you stated its functions are coordinated by the Drug Enforcement Policy Board.

Can you explain why NNBIS should be headed by the Vice-President?

Will the Executive Order change this structure?

A: The National Narcotics Border Interdiction System (NNBIS) had its origin in the South Florida Task Force (SFTF), created by the President in June 1982. Vice President Bush was asked to head the SFTF which was charged with organizing a comprehensive attack against drug traffickers and their organizations. As a result of the overwhelming success of SFTF, NNBIS was created to coordinate future operations to interdict the flow of narcotics in the U.S. Given the unique requirements of interdiction, which includes the involvement of many federal agencies, the coordination with the international community, and the need to increase the support of The Department of Defense and the intelligence community, the President asked the Vice President to head this new national effort. NNBIS, in coordinating regional, national and international interdiction efforts, complements the Policy Board which provides appropriate policy guidance and insures the continued effectiveness of the resource intensive drug interdiction effort by all agencies.

The Executive Order does not change the status of NNBIS. The Chief of Staff to the Vice President will continue to be a member of the Policy Board.

QUESTION FOR SENATOR BIDEN

Q: The White House Office of Drug Abuse Policy was created to coordinate the Federal drug abuse policy effort. Now that the National Drug Policy Board will assume all demand reduction policy authority, will the White House Office be eliminated? What need is there to continue this office under the new Executive Order?

A: The White House Office of Drug Abuse Policy will continue to be a vital link in the President's total anti-drug effort. This office will continue to advise the President and his staff on demand reduction issues and will perform an ancillary function to the National Drug Policy Board. The Director of the Drug Abuse Policy Office will continue to serve as a member of the Policy Board.

The Policy Board will be responsible for the overall coordination of all efforts on both the demand and supply sides of the drug issue.

QUESTION FOR SENATOR BIDEN

Q: I have proposed eliminating the National Drug Enforcement Policy Board, the White House Office of Drug Abuse Policy, and argued that NNBIS should be under the control of one office, in both day-to-day functions and in terms of who is in charge of NNBIS. In its place, I would create one cabinet-level office headed by one person.

In the past you have charged that this could create "more bureaucracy." Can you explain your past comments considering that I have proposed the elimination of three offices or boards and in their place charging one person with drug control policy?

A: First of all, there is one person in charge of drug policy -- the President; and I, through the Policy Board, am charged with carrying out and coordinating that policy, and with acting as an advisor to the President and the Congress on drug policy.

Secondly, just giving everybody the same name is not going to reduce the amount of work that needs to be done or the amount of liaison and coordination that must take place among different groups of people in the public and private sector dealing with different parts of this enormously complex problem. A name change isn't going to solve any of the problems we have today, and will simply set us back the two years we've been building up the Policy Board organization.

The expertise necessary to combat drug trafficking and abuse resides in the Federal government in a diverse collection of departments and agencies, each of which brings it unique combination of skills, capabilities, and experience to the fight. For nearly all of these agencies, the drug issue is only one of many missions and programs. The resources and support structure which these agencies bring to bear on drug trafficking and abuse serve many of their other mission areas as well. If you try to strip away the drug mission from these agencies, and collect them all somewhere else, the resources and support structures will have to be largely duplicated, with an overall growth in government at the same time that you are turning the clock back two years in coordination.

And finally, certainly creating a new cabinet-level, or super cabinet-level entity in government is going to bring along with it a significant entourage -- not only within the new department itself, but elsewhere in government in the form of new oversight bodies both in the legislative and executive branches, just as one example.

QUESTION FROM SENATOR BIDEN

Q: As I understand it, the Board makes decisions by consensus. Is this true?

How can the Board be making difficult resource and strategy decisions if the only decisions that it approves are those on which there is unanimity?

Is this the way you run the Department of Justice?

A: The Policy Board can and does make difficult resource and strategy decisions based on the consensus approach. It is able to achieve this by taking full advantage of the organization's structure, including Coordinating Groups made up of the heads of drug control agencies, subcommittees, working groups, and a diverse interagency staff made up of representatives from each participating agency.

When the Policy Board examines an issue, it does so after the issue has been carefully considered at lower levels within the organization. Issues that can be resolved at the staff and working group levels do not require further debate at higher levels. When there is no consensus at the staff and working group levels, however, issues are presented to the Coordinating Group for resolution. In most cases, for most issues, the Coordinating Group agrees on specific courses of action. When disagreements still exist and cannot be resolved at the Coordinating Group level, these matters are presented to the Policy Board for final resolution. The Policy Board members -- all Cabinet officers -- work as a team in making decisions consistent with Administration policy and the national interest. In the rare event that the Policy Board could not agree, the matter would be taken before the President for resolution. All decisions are made after significant interagency discussion, sometimes at the highest levels.

This is also the way I run the Department of Justice, although the department's structure is, obviously, different from that of the Policy Board. In the department, when there is a difficult policy decision that cannot be resolved, I consult the Deputy Attorney General, the Associate Attorney General, the Assistant Attornies General, my assistants, and other concerned officials, and we generate solutions together using all available resources and expertise. In the few cases where an impasse develops, and my advisors cannot come to consensus, I decide the issue just as the President would in Policy Board matters.

QUESTION FROM SENATOR BIDEN

Q: In its report released in March 1986, the President's Commission on Organized Crime stated:

> Jurisdictional disputes between agencies are the most serious obstacles to success in the struggle against drug trafficking. The personnel of each Federal agency involved ... from the chief executive to the newest employee, must understand that their agency alone can not solve the nation's drug problem. Acceptance of this reality will go a long way in eliminating the destructive competition that in the past has hampered Federal law enforcement.

Recently, the President announced that he would issue an Executive Order that would rearrange the Federal drug control policy structure.

How will that order help in eliminating the agency infighting that has undermined our drug control efforts?

Will this order give you, as Chairman of the National Drug Policy Board, any additional authority over the drug control budget process?

A: The Executive Order announced by the President, as you know, will place all Federal drug control efforts under one umbrella organization called the National Drug Policy Board. This organization will ensure that efforts directed at reducing the demand for drugs are enhanced and fully coordinated with strengthened enforcement activities to reduce the supply of illegal drugs. The National Drug Policy Board will expand the efforts of the old National Drug Enforcement Policy Board, and will continue to build upon the successes of that organization.

The major function of the new Policy Board will be to coordinate all Federal drug control activities. This does not mean, however, that all agencies will automatically agree on every possible policy action. Agencies will disagree from time to time. However, the Policy Board will continue to serve as the forum to address these disagreements and other tough policy issues and to carve out considered solutions that are agreeable to all. Once the Policy Board has determined an appropriate course of action, agencies join together in a unified front to fight the Nation's drug trafficking and abuse problems.

Through the new Executive Order, the National Drug Policy Board will have the additional authority to review, evaluate, and develop Federal drug control policy, strategy, and resources, just as the National Drug Enforcement Policy Board had that authority over drug enforcement matters. This includes, of course, authority over the drug control budget process and any additional tasking of agencies as may be required. However, the Policy Board has no intention of "micro-managing" the operations of each individual drug control agency. The Board will determine drug enforcement, education, treatment, and prevention policies and strategies, and it will set budgetary priorities and provide guidance in all aspects of drug control. Day-to-day drug control operations will continue to be managed and conducted by the dedicated experts in each relevant agency.

EXECUTIVE ORDER

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NATIONAL DRUG POLICY BOARD

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 872, 873, 1111, 1112, 1113, 1114, 1202, and 1203 of title 21 of the United States Code, and in order to coordinate the performance of all drug abuse policy functions of the Federal government, it is hereby ordered as follows:

Section 1. Establishment. (a) There is hereby established the National Drug Policy Board ("the Board").

(b) The Board shall be composed of the following members:

(1) the Attorney General, who shall serve as Chairman;

(2) the Secretary of Health and Human Services, who shall serve as Vice Chairman;

(3) the Secretary of State;

(4) the Secretary of the Treasury;

(5) the Secretary of Defense;

(6) the Secretary of the Interior;

(7) the Secretary of Agriculture;

(8) the Secretary of Labor;

(9) the Secretary of Housing and Urban Development;

(10) the Secretary of Transportation;

(11) the Secretary of Energy;

(12) the Secretary of Education;

(13) the Director of the Office of Management and Budget;

(14) the Assistant to the President for National Security Affairs;

(15) the Director of Central Intelligence;

(16) the Chief of Staff to the Vice President;

(17) the Director of the White House Drug Abuse Policy Office; and

(18) such other members as the President may, from time to time, designate.

Sec. 2. Functions. (a) The Board shall facilitate the development and coordination of national drug policy and shall coordinate activities of Executive departments and agencies to reduce the supply and use of illegal drugs, including international activities, enforcement, prevention and education, treatment and rehabilitation, and research relating to illegal drugs.

(b) In furtherance of its responsibilities, the Board shall:

(1) review, evaluate and develop United States Government policy, strategy and resources with respect to illegal drug law enforcement, prevention and education, treatment and rehabilitation, and research efforts, including budgetary priorities and national plans and strategies;

(2) facilitate coordination of efforts of all Executive departments and agencies to halt national and international trafficking of illegal drugs and to reduce drug abuse;

(3) coordinate the collection and evaluation of information necessary to implement United States policy with respect to illegal drug law enforcement and to the reduction of drug abuse; and

(4) provide policy guidance to the agencies and facilitate resolution of differences in this area concerning interagency activities and other matters affecting two or more agencies.

(c) In order to help coordinate the activities of Executive departments and agencies with responsibility for drug law enforcement and drug abuse reduction, and to supervise implementation of the determinations of the Board, the Chairman shall:

(1) advise the Board in matters concerning its responsibilities;

(2) make recommendations to the Board for the coordination of drug enforcement and drug abuse reduction activities;

(3) correlate and evaluate intelligence and other information to support the activities of the Board;

(4) act as primary advisor to the President and the Congress on national and international programs and policies and the implementation of those policies; and

(5) perform such other duties as the President may direct.

(d) The Board shall carry out all duties and responsibilities of the National Drug Enforcement Policy Board, as set forth in Chapter XIII (The National Narcotics Act) of Title II of Public Law 98-473.

(e) Nothing in this Order shall be deemed to affect the authorities or responsibilities of the Office of Management and Budget, or any Office or official thereof.

Sec. 3. Coordinating Groups. The Board shall establish a Drug Enforcement Coordinating Group and a Drug Abuse Prevention and Health Coordinating Group. The membership and chairman of each Coordinating Group shall be designated by the Chairman of the Board.

Sec. 4. Conforming Amendments. (a) Section 1 of Executive Order No. 12368 is amended to provide as follows:

"The Office of Policy Development has been assigned to assist the President and the National Drug Policy Board in the performance of the drug policy functions contained in Section 201 of Title II of the Drug Abuse Prevention, Treatment, and Rehabilitation Act, as amended (21 U.S.C. 1111). Within the Office of Policy Development, the Director of the Drug Abuse Policy Office shall be primarily responsible for assisting the President and the Board in the performance of those functions."

(b) Section 2 of Executive Order No. 12368 is amended by deleting "Director of the Drug Abuse Policy Office" and inserting in lieu thereof "National Drug Policy Board" and by deleting "he" and inserting in lieu thereof "the National Drug Policy Board."

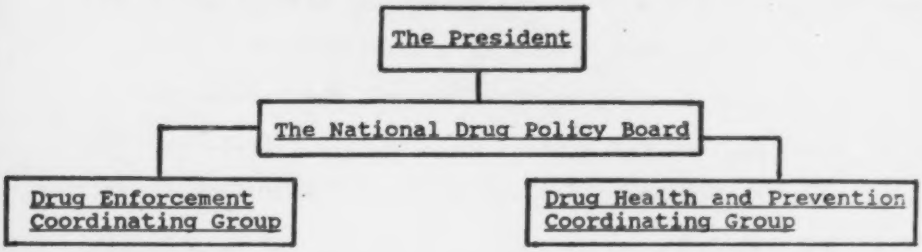
THE WHITE HOUSE,
March 26, 1987.

QUESTION FROM SENATOR BIDEN

Q: At the March 4 hearing, I provided you with a chart describing the current drug policy structure. At the time, you indicated that the chart was inaccurate.

Can you tell me, specifically, how the chart was inaccurate?

A: The current structure of Federal drug policy coordination, as outlined by the Executive Order, is as follows:


The President
The National Drug Policy Board
Drug Enforcement Coordinating Group
Drug Health and Prevention Coordinating Group

Members of the National Drug Policy Board: Attorney General, Chairman; Secretary of HHS, Vice Chairman; Secretary of State; Secretary of the Treasury; Secretary of Defense; Secretary of Interior; Secretary of Agriculture; Secretary of Labor; Secretary of Housing and Urban Development; Secretary of Transportation; Secretary of Energy; Secretary of Education; Director of OMB; Director of Central Intelligence; Chief of Staff to the Vice President (NNBIS); Director of White House Drug Abuse Policy Office; National Security Advisor; and other members designated by the President.

Membership and chairmen of each Coordinating Group shall be designated by the Chairman of the Board. Attached is the list of members of the Drug Enforcement Coordinating Group, chaired by the Associate Attorney General. The members of the Drug Health and Prevention Coordinating Group will include representatives from drug prevention and health agencies; the Chairman and Vice Chairman of the Policy Board, along with the designated Chairman of the Drug Prevention and Health Coordinating Group, are currently developing its membership which will be drawn from the Domestic Policy Council Working Group on Drugs.

The chart you showed me presents an inaccurate and complicated picture of the drug policy coordination structure--because each of its organizational bodies is represented in the National Drug Policy Board structure outlined above. For example, the Vice President's National Narcotics Border Interdiction System, the management system that coordinates drug interdiction operations, is represented on the Policy Board through the Office of the Vice President, and the Domestic Policy Council's drug activities have been assumed by the Board. Indeed, each remaining oversight group now reports to the Board and its Coordinating Groups.

NATIONAL DRUG POLICY BOARD
DRUG ENFORCEMENT COORDINATING GROUP

Associate Attorney General - Chairman

Honorable Phillip D. Brady
Deputy Assistant to the
Vice President

Honorable Donald I. Macdonald
Special Assistant to the
President for Drug Abuse
Policy

Honorable Carol T. Crawford
Associate Director
Economics and Government
Office of Management and Budget

Honorable William R. Kotapish
National Intelligence Officer
for Narcotics
Central Intelligence Agency

Honorable Chapman B. Cox
Assistant Secretary of Defense
(Force Management and Personnel)
Department of Defense

General Stephen G. Olmstead
Deputy Assistant Secretary
of Defesne for Drug Policy
and Enforcement

Dr. Charles R. Schuster
Director, National
National Institute on Drug Abuse
Department of Health & Human
Services

Honorable William C. von Raab
Commissioner
U.S. Customs Service

Honorable Stephen E. Higgins
Director, Bureau of Alcohol,
Tobacco and Firearms

Honorable Donald D. Engen
Administrator
Federal Aviation Administration

William F. Weld
Assistant Attorney General
Criminal Division
Department of Justice

Honorable John C. Lawn
Administrator
Drug Enforcement Administration

Honorable William H. Webster
Director
Federal Bureau of Investigation

Honorable Alan C. Nelson
Commissioner
Immigration & Naturalization Service

Honorable Stanley E. Morris
Director
U.S. Marshals Service

Honorable Ann B. Wrobleski
Assistant Secretary Bureau of
International Narcotics Matters
Department of State

Honorable Thomas E. McNamara
Director, Counter-Terrerism
and Narcotics
National Security Council

Honorable Francis A. Keating II
Assistant Secretary for Enforcement
Department of Treasury

Honorable Anthony V. Langone
Acting Assistant Commissioner
Criminal Investigations
Internal Revenue Service

Honorable Janet Hale
Assistant Secretary for Budget
and Programs
Department of Transportation

Admiral Paul A. Yost, Jr.
Commandant
United States Coast Guard

Honorable George S. Dunlop
Assistant Secretary for
Natural Resources and
Environment
Department of Agriculture

Question from Senator Joseph Biden

CRIMINAL FINES

QUESTION:

In 1984, Congress passed the "Criminal Fine Enforcement Act" which the Department said it needed to enhance the collection of criminal fines and substantially increased the level of virtually all criminal fines. However, collections have substantially dropped since that time -- why are we still having problems?

After the enactment of the Criminal Fine Enforcement Act the collection of criminal fines continues to be a problem for three major reasons. First, the responsibility for the actual receipt of criminal fine monies was thrust upon the United States Attorneys almost overnight. There was little opportunity to prepare our field offices for this added responsibility. The impact of the new responsibility for the cashiering of many cash payments was extremley disruptive to the regular course of business within the United States Attorneys' Debt Collection Units.

Second, although additional personnel were allocated to help the United States Attorneys with this new task, these slots were never funded. The responsibility for the enforced collection and receipt of criminal fines had to be handled without any additional resources.

Third, many judges are imposing uncollectable amounts as fines in spite of the language of the Criminal Fine Enforcement Act. The Act states that the court must find an ability to pay on the part of the defendants, when imposing a fine. The United States Attorneys' accounts receivable reflect large uncollectable amounts that were imposed without regard to the financial status of the defendant.

Question from Senator Biden

Q. A GAO study published last June indicated that only 7% of the fines imposed in cases brought by the organized crime/drug enforcement task forces were collected. Is the fine collection problem unique to these units or a part of a more general problem of fine collection?

A. The fine collection problem is not unique to the offices which were the subject of the GAO study. The labor intensive work entailed in the receipt and depositing of money has had an adverse impact on all offices. In some locations, particularly near military bases, the bookkeeping requirements hinder the debt collection work due to the sheer volume of fines assessed. The imposition of large fines on indigent defendants has added to the problem.

QUESTION FROM SENATOR BIDEN

Question:

We created the Crime Victims Fund in the 1984 Crime Bill with strong support from the Administration, yet your budget proposes to limit disbursements from the fund. If budget constraints are the reason, how can you justify these cuts when we would have enough money if your Department were more aggressive in collecting criminal fines?

Answer:

The reason the Administration proposes to limit disbursements from the Crime Victims Fund is not related to the collection of criminal fines. The proposal to limit obligations to $35 million was made as part of the Government-wide effort to reduce the Federal deficit. The deficit is measured by outlays. An obligation limitation will reduce outlays and thus reduce the deficit. Collections in excess of an obligation limitation up to the legislative ceiling will remain in the fund unless legislation is passed to reduce the ceiling. When the ceiling is reduced, the excess funds will go into miscellaneous receipts and will be used to reduce the deficit even further.

"Questions from Senator Biden"

Q. AS PART OF THE 1984 CRIME BILL'S FORFEITURE PROVISIONS, WE INCLUDED A SECTION UNDER WHICH THE PROCEEDS FOR JOINT FEDERAL AND STATE/LOCAL FORFEITURE OPERATIONS WOULD BE SHARED. IN 1986, $505 MILLION OF ASSETS WERE SEIZED BUT LESS THAN 5% A TOTAL OF $24 MILLION, WAS SHARED WITH STATE AND LOCAL AGENCIES-- WHY? DOES THIS INDICATE THAT COOPERATIVE SEIZURES ARE INFREQUENT OR ARE STATE AND LOCAL AGENCIES NOT PLAYING A SIGNIFICANT ROLE IN SEIZURE OPERATIONS.

A. Underlying this question is the understandable premise that the federal government keeps everything it seizes. The amount forfeited which is available to be shared is a small portion of that originally seized. Much of the property seized is subject to mortgages or is otherwise obligated to good-faith lienholders who are innocent and have no knowledge of the underlying misconduct involved. Under those circumstances, payment must be given to those who hold these "innocent" secured interests. Once the remainder is forfeited, we must deduct the cost of seizing the property, appraising it, evaluating it, storing it, maintaining it, and liquidating it. Then, after all of that is deducted, we share as much as we can with state and local law enforcement authorities so as to reflect their respective contributions. The amount we have available to share, then, is inevitably only a small portion of what we originally seized.

A more accurate measure of the percentage of property shared with state and local agencies is to compare sharing with net forfeitures. During FY1986, about one of every five dollars of income to the Justice forfeiture fund was returned to state and local law enforcement agencies under the equitable sharing program -- a total of over $17 million in cash payments. When combined with the $7 million in forfeited property, primarily conveyances, transferred to state and local agencies during FY86, the total property shared with state and local agencies was the $24 million noted in the question. Preliminary figures for FY 1987 indicate that we are well ahead of FY86 rates with the result that the total property shared during the current fiscal year should far exceed the FY86 total.

Question from Senator Biden

Q. ONE OF THE PROBLEMS WITH SHARING FORFEITURE PROCEEDS IS THAT THE DEPARTMENT HAS BEEN DRAGGING ITS FEET IN PROCESSING APPLICATIONS -- WHY THE DELAY? HOW CAN FORFEITURE SHARING BE USED TO JUSTIFY CUTS IN GRANTS TO STATE AND LOCAL AGENCIES WHEN THE DEPARTMENT IS NOT EVEN TURNING OVER THESE ASSETS TO THESE AGENCIES?

A. First, sharing can take place only after a property has been seized, forfeited, and in some cases, liquidated. All of this necessarily takes some time. There are also three other main reasons which can cause some delay, and two of them are generally unavoidable.

If, for example, the property is involved with a criminal case, the forfeiture must be postponed until the conclusion of the criminal trial, a decision which necessarily results in some delay. The alternative is to try to resolve the matter before or during the criminal trial, but serious discovery problems usually prohibit that. For this reason, judicial forfeitures are often postponed causing some delay. Once the criminal case is concluded, the forfeiture questions are resolved as promptly as possible.

Another potential cause for delay is that often that which is seized is cash. In some cases, it is needed for evidence and cannot be disbursed until the criminal trial is completed. To lessen the chance this causes a problem in the future, we recently issued a directive to all United States Attorneys, the Drug Enforcement Administration, the Federal Bureau of Investigation, the Immigration and

Naturalization Service, and the United States Marshals Service. That directive said in part that:

> . . . effective May 1st, all currency seized which is subject to criminal forfeiture or to civil forfeiture, is to be delivered to the United States Marshals Service (USMS) for deposit in the USMS Seized Asset Deposit Fund either within sixty days after seizure or ten days after indictment, whichever occurs first. Where appropriate, photographs or videotapes of the seized cash should be taken for later use in court as evidence.
>
> Limited exceptions to this directive, including extensions of applicable time limits, will be granted, on an interim basis, only with the express written permission of the Assistant Attorney General, Criminal Division, and are to be sought through the Asset Forfeiture Office, Criminal Division. Retention of currency will be permitted when retention of that currency, or a portion thereof, serves a significant independent, tangible, evidentiary purpose due to, for example, the presence of fingerprints, packaging in an incriminating fashion, or the existence of a traceable amount of narcotic residue on the bills.

Finally, part of the delay you refer to has been caused by an unexpected backlog in the processing of administrative forfeitures, particularly those processed by the DEA. On November 25, DEA approved the establishment of a Task Force to review and process a backlog of approximately 9,500 cases. This Task Force started its work on January 5, 1987, and plans to eliminate the backlog over the next three months.

QUESTION FROM SENATOR BIDEN

Question: The management side of the Department's forfeiture programs has had problems with misuse of funds and improper treatment of property, yet the Department is asking for an increase in reimbursement for expenses to these agencies. How can we be sure that we are getting our money's worth from the fund's expenditures?

Answer: The Marshals Service has not experienced any significant management problems with seized or forfeited property and is not aware of any misuse of funds or improper treatment of property by our organization. Anticipated increased expenditures for property management is directly related to the increase in the volume and complexity of seized assets.

Since most expenditures from the fund are for non-property management items, (i.e., payments of claims or liens; equitable sharing with state and local police agencies retrofitting of forfeited property for official use) the measurement of our "money's worth" may be subjective. There appears to be a very favorable public acceptance of the sharing of forfeited assets with local governments.

THE LAST ENACTED AUTHORIZATION WAS FOR FISCAL YEAR 1980. COULD YOU COMMENT ON THE DIFFICULTIES THAT THE DEPARTMENT FACES, AND PARTICULARLY LAW ENFORCEMENT AGENCIES BECAUSE OF THE UNCERTAINTY OF THE DEPARTMENT'S AUTHORITY LAPSING OR NOT BEING UPDATED?

Most of the substantive administrative and financial management authorities that are necessary for the Department are contained in the 1980 Authorization Act (Public Law 96-132). This law, through extensions, has been the basis for these activities over the past eight years. There are several difficulties that arise, however, as a result of the fact that these authorities lack permanence, lapse at the end of the fiscal year, and have not been updated for eight years.

The authorities created by the 1980 Authorization Act are fragmented among over a dozen different appropriations and without any overall structure. This can hinder implementation of uniform financial management policies and regulations that promote more efficient management practice. This problem is compounded by the fact that these are only annual authorities with no certainty that they will be reenacted. This is a major reason for the Department's proposal in S.517 for comprehensive authorities in a centralized format that would be codified in Title 28 and available on a permanent basis.

Our inability to have our authorities updated on a regular basis is also problematic. For example, this year it will be necessary to have enacted an authorization of appropriations for the Assets Forfeiture Fund. The Fund was not in existence when the 1980 Authorization Act was passed and therefore merely continuing the 1980 Act will not authorize appropriations for the Fund. The Act establishing the Fund authorized appropriations for four fiscal years (1984, 1985, 1986 & 1987). Appropriations are not now authorized for the 1988 fiscal year and therefore appropriations for the Fund could be subject to a point of order unless a new authorization bill is enacted.

Our law enforcement bureaus are also affected by the fact that no new authorization bill has been enacted for eight years. A principal area of concern is with our undercover authorities. These authorities were part of the Department's first Authorization Act (Public Law 95-624) but it has become necessary to rely on appropriations acts in order to change, update and extend these authorities. These authorities are currently in need of significant change in order to ensure that they accurately reflect the needs and realities of our undercover investigations. In addition, these authorities should be extended to the Immigration and Naturalization Service and the United States Marshals Service in order to ensure that, along with the Federal Bureau of Investigation and the Drug Enforcement Administration, their undercover operations are conducted with scrupulous regard for all technically applicable laws.

Authorization Insert

The President and the Congress frequently establish new activities, initiatives or functions with the Department of Justice. The periodic extension of old appropriations authorities by annual appropriations acts results in critical omissions which must be authorized, by implication or otherwise, in appropriations acts. These expansions of formal authorities within appropriations acts are subject to points of order, and create uncertainty from year to year whether the authorities will continue. For example, the Department's last enacted appropriations authorities do not include the Cooperative Agreement Program within the Support of U.S. Prisoners appropriation, undercover authorities for the Drug Enforcement Administration, the Foreign Claims Settlement Commission, or the immigration user fee. It is especially critical that an appropriations authorization act be enacted for 1988 due to the recent enactment of new responsibilities under the Immigration Reform and Control Act ~~and the expiration of appropriations authorization for the Department's Asset Forfeiture Fund this fiscal year.~~

[illegible] QUESTION FROM SENATOR BIDEN

Question 2   THE BUDGET SUBMITTED BY THE DEPARTMENT OF JUSTICE INCLUDES A CUT OF 1[illegible] POSITIONS ($2.[illegible] MILLION) FOR THE ANTITRUST DIVISION AND THE PRESS RELEASE ISSUED JANUARY 5 INDICATES THAT THESE SAVINGS ARE POSSIBLE BECAUSE OF "IMPROVED EFFICIENCY", "REALIGNMENT OF POLICY AND SUPPORT FUNCTIONS", AND "CURTAILMENT OF CERTAIN LOWER PRIORITY ACTIVITIES". COULD YOU EXPLAIN WHAT IS MEANT BY THOSE DESCRIPTIVE PHRASES?

Answer: The proposed reduction in resources devoted to the Antitrust Division is based on the Administration's determination that certain items in the Division's budget can be cut without jeopardizing the core programs of prosecution of criminal antitrust behavior and merger evaluation. We fully support the objective of maintaining a strong antitrust enforcement presence in the marketplace. We anticipate that the proposed reduction in resources for fiscal 1983 will be attained through attrition, and will be applied primarily to the Division's amicus and competition advocacy programs, general policy and economic analysis, management, and administrative support. The very small decrease proposed in the Division's higher priority enforcement programs can be proposed at this time due to the efficiencies which greater automation and better use of staff resources have brought to the support for these programs. Indeed, we believe we will be able to do more than in the past in these areas, even with the slight staff reductions

FOLLOW-UP QUESTION

WHAT KIND OF POSITIONS ARE BEING CUT? ARE THESE LINE ATTORNEYS? ARE ALL THE POSITIONS IN WASHINGTON OR ARE MANY OF THESE POSITIONS IN THE FIELD OFFICES?

Answer The Division will reduce its staff by 15 economists, 54 support personnel, 23 attorneys, and 8 paralegal specialists to achieve this reduction. All of the proposed reduction will be taken in Washington, D.C.

Question from Senator Biden

AS YOU PROPOSE IN YOUR AUTHORIZATION BILL, THERE ARE A NUMBER OF ROUTINE ACTIVITIES THAT COULD BE MADE A PART OF A PERMANENT AUTHORIZATION STATUTE AND COULD (sic "SHOULD"?) NOT BE PART OF THE TRADITIONAL AUTHORIZATION PROCESS. I WOULD ALSO LIKE TO CONSIDER A TWO YEAR AUTHORIZATION. THIS WOULD HELP MEET THE CONDENSED TIME SCHEDULE WE NOW HAVE FOR AUTHORIZING AND APPROPRIATING FUNDS UNDER THE GRAMM-RUDMAN-HOLLINGS PROVISIONS. THIS MAY REQUIRE SOME ADDITIONAL REPORTING TO CONGRESS ON YOUR ACTIVITIES, BUT DON'T YOU AGREE THAT IT WOULD GIVE YOU A CLEARER INDICATION OF YOUR AUTHORITIES FOR PLANNING AND MANAGEMENT PURPOSES?

There are two aspects to this question. The first concerns the overall efficacy of enacting a number of non-controversial authorities on a permanent basis. We strongly support such action and this result would be accomplished if our proposed authorization bill (S.517) were enacted. If these authorities were enacted on a permanent basis, the annual (or biannual) authorization process would be able to focus on substantive budgetary issues. Additional authorities would only be requested if some amendment or new authority were appropriate.

The second aspect to this question is whether the Department would support a two year budget cycle for the authorization of appropriations. We have no fundamental objection to this perspective. Our primary concern with changing the authorization cycle at this point arises from the fact that our present budget process is only now beginning to gather data for the 1989 fiscal year budget. It is difficult, if not impossible, to arrive at accurate appropriations requests for the 1989 fiscal year. Any two year cycle would have to afford the Department some flexibility regarding these second year funding levels.

The Department is not opposed to additional reporting requirements that would be appropriate under a two year budget cycle. Our only request is that we be afforded an opportunity to work closely with the Committee to ensure that these requirements would make effective use of our existing internal management and control structure and that they would produce timely information of value to the Committee in exercising its oversight function.

Question from Senator Biden

IN MARCH OF 1986, THE GENERAL ACCOUNTING OFFICE RELEASED A DETAILED REPORT ON THE PROBLEMS THE JUSTICE (sic) HAS BEEN HAVING WITH MANAGEMENT AND OPERATIONS AND INCLUDED RECOMMENDATIONS FOR IMPROVEMENTS --- ONE OF WHICH CREATES A POSITION OF INSPECTOR GENERAL FOR THE DEPARTMENT. AFTER TEN MONTHS REVIEW DO YOU NOW ENDORSE ANY OF THE RECOMMENDATIONS, AND IF NOT, WHAT PROPOSALS HAS THE DEPARTMENT FORMULATED TO ADDRESS THESE PROBLEMS.

The Department prepared a detailed response to the General Accounting Office review of these issues. Attached is a copy of the Department's responses.

U.S. Department of Justice

Washington, D.C. 20530

JUL 30 1986

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to the provisions of Section 236 of the Legislative Reorganization Act of 1970, the Department of Justice is responding to the United States General Accounting Office's (GAO) report issued March 14, 1986, subject: "Justice Department: Improved Management Processes Would Enhance Justice's Operations," (GAO/GGD-86-12).

The major theme of the GAO report focuses on the Department of Justice's need for a department-level policy/planning/management entity. To meet this objective, the report presents recommendations for (a) improving the management systems used for planning, coordinating, and directing departmental programs, and (b) assessing the appropriate distribution, use and control of resources. Additionally, the report offers three possible organizational options for the Attorney General's consideration to enhance management direction and control.

The Department is in general agreement with the report's specific recommendations to integrate the budget and management planning processes, improve the budget formulation process, improve management of the Department's information resources, develop and implement a departmental financial management plan, place emphasis on program effectiveness reviews for decision-making, and ensure implementation of the management and productivity improvement program. Furthermore, the Department agrees that there should be improved planning and coordination in the areas of audit and evaluation. Since the time GAO completed its review over a year ago, the Attorney General has given his foremost attention to enhancing managerial systems in order to strengthen his oversight of program operations and centralize planning and management.

Recognizing the need within the Department for the component organizations to work together more closely in order to achieve their interrelated missions, the Attorney General's first major step was to create the Department Resources Board (DRB). The DRB, chaired by the Deputy Attorney General, is the mechanism by which the Department is integrating its management processes and developing a system that focuses on long-range goals, department-wide priorities, coordinated operations, and accountability for results. The key functions assigned to the DRB include: strategic long-range planning and policy development, program development, resource guidance and budget formulation, evaluation of policy implementation, development of departmental standards for performance and productivity measurement, and implementation of the Department's Management and Productivity Improvement Program.

During the one year that the DRB has been in existence, it has proven to be an effective, flexible mechanism of assistance to the Attorney General in planning, directing and controlling the Department's diverse programs and activities. In addition, interrelated actions have been taken to strengthen and improve specific management support systems. The status of each of these support systems is briefly discussed below.

Budget Formulation

The FY 1988 Spring Planning Call merges, for the first time, the four Department planning processes--budget, management and productivity, procurement, and automated information systems. The format of this new integrated planning effort refocuses attention from the decision unit justification process used in the past to formulating requests by initiative in order to better illustrate each organization's plan to meet the President's and the Attorney General's priorities. The Attorney General's guidance for FY 1988 project budget estimates was issued May 9, 1986, advising departmental organizations of basic mission priorities to be used in developing their resource requests. The DRB has been directed to operate under these guidelines in making its recommendations to the Attorney General on the final Department budget request.

Financial Management

As GAO points out, the Justice Management Division (JMD) assumed a leadership role in developing a comprehensive strategic plan for improving the Department's financial management environment. The plan, which was issued in September 1985, provided for development of a single integrated financial management system for the Department, and representatives from each major organizational component participated in the development process. Involvement of the component organizations was a vital step in building consensus and ensuring that all viewpoints were considered. The plan conforms to the objectives of Office of Management and Budget (OMB) Circular A-127 as well as other circulars and bulletins governing the management of federal information resources. Implementation of the plan is in progress and FY 1987 funding for the project was approved by OMB and included in the Department's FY 1987 budget. Continued implementation of this initiative is a key element in the Department's overall Management and Productivity Improvement Plan.

Information Resources Management (IRM)

The Department recognizes that information technology is a central element in strengthening the policy and planning aspects of its missions. Several major initiatives are now underway which are designed to effectively set department-wide policy as well as control data processing, telecommunications, and systems development activities. These initiatives are an integral part of the Department's IRM program and its automated information systems (AIS) management program, the latter being a major element of IRM. By the end of FY 1986 the Department plans to issue three orders and take action in several other areas. These initiatives, as well as our comments on certain of GAO's discussions and recommendations related to IRM, are detailed below.

1. Issue an order on the "Information Resources Management Program." This will be an "umbrella" order that provides a formal structure to the Department's existing IRM program, identifies information as a management resource, indicates Department components having oversight responsibility for IRM functions, requires components to designate an IRM contact, and lists all current Department orders relating to IRM.

2. Revise our order on "Automated Information Systems Policies." This order will update our existing 1982 order to include policy and guidance disseminated by (a) publication of the Federal Information Resources Management Regulations, (b) issuance of OMB Circular A-130 entitled "Management of Federal Information Resources," (c) creation of the DRB by the Attorney General, (d) and related direction from other central management agencies. The order will provide policy and guidelines to assist component organizations in the planning, development, and acquisition of AIS resources that are more cost effective and technically suitable, and simultaneously streamline the approval process itself.

3. Issue an order on "Off Worksite Use of Automated Information Resources." This order will provide the detailed policies and procedures to be followed by employees in the use and management of automated information resources (including data, equipment, software, and supplies) while at a site which is not the official duty station.

4. The Department is also in the process of developing a department-wide Automated Information Systems Plan which is scheduled for completion by the end of this fiscal year. The

plan will contain policy issues which cut across organizational lines and mandate coordinated planning considerations which must be specifically addressed by each component organization in the formulation or update of their respective AIS plans. The Department has already provided OMB with a preliminary department-wide AIS planning framework along with a related management improvement initiative.

5. With reference to GAO's extensive discussion concerning a departmental case management system, a formal development mechanism, supported by senior management, has now been established, i.e., the Department's Uniform Office Automation and Case Management Project. This Project, chartered by the Deputy Attorney General on December 9, 1985, will provide all six litigating components and the United States attorneys' offices with the automated information technology necessary to increase efficiency; strengthen management; and improve productivity through (a) coordinated planning, (b) cooperative action to define requirements and share solutions, (c) and eventual complete inter-operability. The Project is directed by a senior management Steering Committee, and managed by the Deputy Attorney General's Special Advisor for Technology who, in turn, is assisted by a project management team as well as programmatic and operational expertise provided by various working groups and a user subcommittee. The project team has issued its Phase I Report, which is currently undergoing internal review within the Department. The report includes conclusions and recommendations as to how the litigating divisions, the United States attorneys' offices, and the Department's senior management offices should proceed in acquiring office automation and case management capabilities. The Department has requested a $10,000,000 fund for FY 1987 to begin implementation of this project, and will require additional substantial funding in the future to bring to fruition an integrated, compatible system which will, in the long run, provide an offsetting return on investment, increased productivity, and a reliable summary-level Department of Justice Case Management System which aggregates data from the litigating components.

Specific automation functions to be performed include word processing, inter- and intra-office communication, document transfer, management and office support activities, electronic mail, and case management. Access will also be provided to a variety of information systems applications and facilities, including legal research, litigation support, attorney timekeeping, and personnel and financial management systems.

6. With reference to the need for a Justice Telecommunications Network (JTN) to avoid redundant networks throughout the Department, a proposed study to update the original study, cited by GAO, is scheduled for FY 1987. In November 1984 the Department withdrew the JTN funding because of budgetary constraints. Since then the original JTN study has proved to be conservative in terms of estimating uncontrollable cost increases. The full impact of telecommunications service and costs on the Department's ability to conduct its mission has been emphasized due to the Gramm-Rudman-Hollings funding constraints. The reactivation of the JTN is in response to this new environment. The Department is requesting funds for FY 1988 to support the telecommunications requirements of the Department's critical missions by providing:

    a. Interoperability within and without the Department through controlled network gateways.

    b. Flexibility to meet critical tactical missions and accommodate new requirements.

    c. Security of sensitive but non-classified requirements.

    d. Availability and maintainability, using network control technology, of the Department's continuous 24-hour operational missions.

    e. Reductions in costs to meet Gramm-Rudman-Hollings constraints and management/productivity goals by eliminating duplicative networks, minimizing the use of tariff-dependent services, and assuming technical control of the network.

7. With respect to GAO's observation on page 74 that the JMD continued to approve telecommunications funding requests during the same time period JTN was to be funded, it is necessary to differentiate between voice and data telecommunications. The JTN referred to by GAO is associated with combining non-classified data networks into a single network environment. Currently, the Department's data communications are characterized by independent private leased lines and public value-added networks. As previously noted, a funding request has been submitted for FY 1987 for a new study on optimizing the Department's data communications environment. Meanwhile, a network is not available instantaneously; thus expenditures will necessarily precede availability. Transitions in a planned schedule are essential; hence, both the JTN and transitional continuation of other existing systems will require funding. Until the results of the new study are known, the Department will restructure and optimize the existing networks in order to

partially fulfill critical operational support needs and offset uncontrollable tariff increases. Additionally, the Department will devote its limited resources to the requirement for increased voice communications management as a result of divestiture and deregulation.

In the interim, the Department requires central approval of all telecommunications initiatives. Networking plans are reviewed in light of meeting crucial operational needs at the least cost to the Government and preserving competition. Guidelines have been issued, for example, governing the acquisition of PBX's. These guidelines reflect the Department's policy of compatible solutions to voice and data needs and the evolution towards the merging of these two technologies.

8. To insure successful development and implementation of a plan for managing the Department's information resources, GAO recommends on page 79 that the senior official responsible for IRM be experienced in the planning and coordination of IRM. The term IRM encompasses several programs, all of which fall within the programs managed by the Assistant Attorney General for Administration (AAG A). As the senior manager of these functions, the AAG/A is sufficiently experienced in the various aspects of IRM. The accomplishments cited above document this official's ability to ensure successful plan development. Furthermore, he is supported by staff with considerable experience in planning, especially for AIS, which comprises a major resource within Justice's IRM program.

9. GAO also recommends on page 79 that the senior official responsible for IRM clearly possess the authority to direct component actions on automated data processing and telecommunications activities in order to ensure that component plans, budgets, and activities conform with goals established by the DRB and the departmental plan. Although, as GAO has noted, the AAG/A is placed at a departmental policy-making level equal to other component heads, this official has, in fact, the tacit and regulatory authority to issue, and to insist on adherence to department-wide policy regarding all aspects of information resources management. (The Paperwork Reduction Act, which took effect on April 1, 1981, requires that the Senior Official must report directly to the agency head (§ 3506(b)). Furthermore, the AAG/A is one of four permanent members of the DRB, and is thus a key player in the planning and resource allocation process.

Position Management

The Department agrees that position management is a management tool to promote the efficient use of staff resources. Implementation of this concept is one of the Department's management and productivity improvement initiatives and is currently in progress. In a memorandum dated April 21, 1986, the Attorney General provided guidance to the heads of the Department components advising them of their responsibilities and outlining the role of JMD in implementing a department-wide position management program. Under the program, component organizations will be responsible for (1) developing action plans to determine the effectiveness of their position management initiative, (2) conducting reviews to evaluate positions for need, soundness of design, adequacy of description, and accuracy of classification, and (3) taking corrective action consistent with the principles of effective position management and classification. JMD's role will consist of monitoring component organization actions pursuant to the program and providing guidance and assistance.

Audit and Evaluation

Department policy officials recognize the importance of independent assessments of the efficiency and effectiveness of programs as a basis for decisions on whether to continue or alter program policies. Action is being taken to increase the availability and use of program effectiveness reviews to focus greater attention on major cross-organizational management and resource issues that will strengthen central oversight capabilities of the Attorney General, DRB, and senior level management. The Department is establishing a department-wide evaluation manager's forum to (a) improve the interchange of information among evaluation components, (b) develop cooperative approaches for providing more comprehensive coverage of broad, cross-cutting issues that affect several operating components, and (c) prepare an inventory of department-wide management and resource issues from which selected studies can be designated for review. In conjunction with the above the JMD Audit Staff is continuing to place increased emphasis in its workplan on conducting more program results audits.

Management and Productivity Improvement

A Department of Justice Management and Productivity Improvement Program was established by the Attorney General in September 1985 and seven policy goals were identified for carrying out the Program. All of the Department's components must address these goals in their planning, budgeting and operational activities.

To initiate the Program, a short-term plan for management and productivity improvement was developed last fall. The plan includes approximately 80 separate initiatives. At the present time, the Department is developing a long-range plan that will focus on priority improvement efforts over the next five years. Through implementation of this plan, the Department's integrated planning process will be tied to the budget formulation cycle. Our long-range plan will be submitted to OMB in September as a companion document to the Department's FY 1988 budget.

As the GAO report notes, a Policy and Planning Office (PPO) was created to address a broad range of management improvement issues and designated to monitor the Department's incorporation of productivity management considerations into the overall management process. The PPO provides the Department with an enhanced capability for management planning, analysis and review. Its functions include ensuring that management and productivity improvement initiatives show steady and sustained progress and are implemented in a timely manner.

The Department has also established a Management Forum comprised of senior management officials from each of the component organizations and chaired by the AAG/A. The primary purpose of the forum is to meet periodically to interchange ideas and information and surface issues of department-wide concern. The Forum has proved to be particularly effective as an umbrella coordinating mechanism wherein various committees are established to deal with specific topics such as AIS planning, evaluation, and productivity improvement.

In support of the President's Executive Order on Productivity Improvement, the Department has recently developed initiatives to improve productivity in the Federal Prison Industries Productivity Distribution Centers (Federal Prison System); National Prisoner Transportation System (United States Marshals Service); and Adjudications Processing (Immigration and Naturalization Service). In addition to the above, other productivity improvement initiatives are being developed as part of the Department's long-range management and productivity improvement planning process.

* * * * *

With respect to the specific management support systems discussed above, we believe the innovations noted in the Department's basic systems and processes will result in lasting, institutionalized improvements. They will provide the foundation to support the Attorney General and successor Attorneys General in planning, directing and controlling the Department's programs.

GAO makes the observation that one cause of the weaknesses in departmental direction and oversight is the fact that JMD is organizationally too low to provide needed central management guidance. To enhance central management within Justice, GAO proposes three options. The report, containing the three options, has been widely circulated among senior management officials in the Department for their views. The options have generated a substantial amount of internal comment. However, at this point, a thorough review and analysis of the options has not yet been completed.

Comments on Report Recommendations in Appendix IV

Appendix IV of GAO's report recommends that five short-term actions be taken to improve financial management while the Department is implementing its long-term financial management plan. These actions are discussed individually below.

Immigration and Naturalization Service (INS) Debt Collection Efforts

Although GAO points out that significant progress has been made in INS' debt collection efforts, we agree that a new system needs to be developed centrally to maintain better information on debts owed to INS. The Office of General Counsel, which is responsible for collecting INS' delinquent debts if the finance staff is unsuccessful in its efforts, had requested that a new system be developed to centralize debt collection data and improve the accuracy and reliability of the amounts owed. Development of the new system was deferred because of higher priority work and the lack of funding. Subject to the availability of funds, INS is now planning to reactivate development of the debt collection system needed by the Office of General Counsel to enhance its collection of past due debts.

Working Capital Fund

The report recommends that appropriate internal controls and procedures be implemented so that the Working Capital Fund recovers all costs incurred and thereby precludes the need to write-off future accounts receivables. The Department's write-off of some "intra-governmental" accounts receivable was the result of problems experienced with reimbursable agreements not being properly executed. As a result of these problems, several procedural changes were instituted. Reimbursable agreements now include the information necessary to execute billings and, more importantly, reimbursable agreements are mandatory with all customer organizations.

Although GAO did mention that an independent contractor recently performed an assessment of the Working Capital Fund's financial position, no reference was made to the more significant opinions rendered by the contractor based on tests performed in accordance with generally accepted government auditing standards for financial and compliance audits as promulgated by the Comptroller General. The contractor rendered an unqualified "clean" opinion on the financial position of the fund and concluded that the results of the fund's operations were reported in conformance with generally accepted accounting principles.

Departmental Billings Against the Superfund

GAO noted in the report that the Land and Natural Resources Division did not have adequate cost information for billing the Superfund. This condition was disclosed by the JMD Audit Staff as a result of an audit of the Superfund Interagency Agreement. As the report points out, subsequent to the audit, the Lands Division, in cooperation with JMD's Audit and Finance Staffs and the Environmental Protection Agency, has revised its procedures to ensure that costs are charged in accordance with government accounting standards. Additionally, the Division has undertaken two projects to further improve the accuracy of the Superfund billings. First, the Division has commissioned a study of the attorney time system to determine how it can be made more accurate and useful, thus further improving the accuracy of the Superfund billings. Second, the Division is in the process of auditing the costs incurred in each Superfund case to ascertain that all the costs of litigation are recovered.

Recording Affirmative Litigation Collections

The report recommends that affirmative litigation collections be recorded in the Department's general ledger. The Department agrees and corrective actions are being taken to address this issue and report all litigative collections and receivables. A consolidated reporting system is being developed for legal process debts. The reporting requirements of the system will be designed to call for information that will support future general ledger processing.

Accountability for Total Seizures and Forfeitures

The accountability for seized and forfeited assets is included in the Department's financial management system plan. The plan provides for the classification of software functions into three tiers. The accountability for seized and forfeited assets is classified under the second tier, which includes those financial functions that are common to some, but not all, Justice components. The component organizations sharing responsibility for the development of an integrated financial management system to account for seized and forfeited assets include the Federal Bureau of Investigation (FBI), Drug Enforcement Administration

(DEA), United States Marshals Service (USMS), INS, and JMD. As the responsible organization for overall management of seized assets that are subject to administrative and judicial forfeiture, the USMS will serve as the lead component in the development of the system.

In order to coordinate the financial activities of the components responsible for the seizure and forfeiture of assets, to improve the financial management policies and accounting processes, and to plan the development of an effective asset seizure and forfeiture system, the following actions have been undertaken:

a. A Forfeiture Management Information System Review Committee has been established to develop department-wide information and accounting requirements.

b. A departmental order addressing the financial management of seized and forfeited assets has been drafted and circulated for comment.

c. An intensive review is being made of seized cash practices within DEA and the FBI. This review will determine the effectiveness of current seized cash management procedures, and the savings expected to be realized as a result of the Department's emphasis on expeditious deposits.

Comments on Report Recommendations in Appendix V

Appendix V of GAO's report discusses Justice's development of a department-wide procurement management information system and the oversight functions of the Department Procurement Executive. With respect to the Procurement Executive's review of the Department's procurement activities, GAO recommends that the exclusion of FBI proposed contracts from Department Procurement Executive reviews be rescinded. A procurement management review of all procurement offices within the Department, including the FBI, is now in progress with the objective of obtaining an in-depth understanding of the Department's current procurement process and gathering of sufficient data necessary to support the need for procurement reforms department-wide.

The review will also provide an opportunity to assess the need to continue to exclude FBI procurement activities from departmental procurement reviews and point out any problems faced by the Procurement Executive in achieving reform initiatives and dealing effectively with department-wide oversight. Areas of reform include establishing standards for qualifications of contracting officers, developing an integrated management system for procurement training, designing systemic productivity management techniques to streamline procurement operations, and consolidating requirements and resources, where feasible.

Overall, these measures should improve procurement operations and increase procurement productivity at a lower cost.

The report suggests that the Procurement Executive be provided the authority to designate contracting officers. Currently, the Procurement Executive is establishing qualification standards for contracting officers. Based on these standards the Procurement Executive will certify as to the qualifications of individuals acceptable for appointment as contracting officers. This procedure will negate the need for the Procurement Executive to perform the actual delegations of authority for each organization. Each organization may then designate its own contracting officers as long as they are certified by the Procurement Executive as meeting the qualification standards. Moreover, this procedure will not be a deterrent to the organizations in determining how many contracting officers they may need.

Comments on Appendix VII--Seized and Forfeited Property

Appendix VII pertains to those aspects of the asset seizure and forfeiture program administered by the USMS. In general, most of the problems relating to the asset seizure and forfeiture program reference the 1983-84 era when the National Asset Seizure and Forfeiture (NASAF) Program was in its developmental stage. We do not consider the report to be a particularly accurate reflection of the overall seizure program as it existed at the end of 1985. Unfortunately, the reader is led to believe that serious problems continue to exist in the overall management, control, and sale of seized assets. Rather than proceeding to take exception to many of GAO's comments and conclusions, we believe it would be more beneficial to provide a general discussion of the NASAF Program and the issues involved in its development.

Between 1979 and 1981, conveyance seizures increased so dramatically that law enforcement agencies more than doubled the number of seizures. As a consequence of the growing inventory of seized property, the Department's system of seized conveyance management became inadequate. The NASAF Program evolved virtually overnight under an exceptionally heavy and growing case-load of complex forfeiture actions. The Program brought together representatives of the USMS, United States Customs Service, United States attorneys' offices, DEA, FBI, INS, and the Criminal Division to coordinate development of unified seizure and forfeiture management policies. This initiative was a key factor in fostering interagency cooperation and teamwork in the asset forfeiture area.

As with any new initiative, the NASAF Program experienced a slow start-up due primarily to delays in the recruitment and training of staff, and the dissemination of rapidly evolving guidelines, policies and procedures to the field office operational levels. Problems concerning roles and responsibilities of all participating agencies at the operational levels were anticipated, addressed by senior department officials, and for the most part, have been resolved.

For example, decisions on seizure actions under $750,000 are made at the local level from both the litigative and property management perspectives and are reviewed by the Criminal Division's Asset Forfeiture Legal Office and the USMS' NASAF Program office. Decisions on assets valued over $750,000 are reviewed and approved at even higher levels of the Department and the USMS. While some differences of opinions have and will continue to be experienced, such problems are growing less frequent and are normally resolved in a positive manner by senior management officials.

The report generally concludes that the lack of advanced planning by the USMS may have resulted in a delay in full program implementation, jeopardized forfeiture litigation, and diminished proceeds from the sale of forfeited properties. There is no record of litigation being jeopardized due to the lack of USMS planning, or evidence that assets under USMS management resulted in diminished proceeds at the time of sale. While it is true that the planned turnover of administratively seized vehicles from INS is proceeding slower than anticipated due in part to FY 1986 budget restrictions, the phase-in is scheduled for completion during FY 1987.

We find GAO's analysis of the seizure and forfeiture program administered by the USMS to be predicated, in large part, upon issues associated with the storage and disposal of conveyances seized under administrative procedures by the United States Border Patrol and for conveyances under the physical control of the Customs Service. The report implies that problems relating to the storage, management and sale of conveyances, which are not currently under the management control of the USMS, are also being experienced in the management of all other types of assets. The fact is that the Department made a conscious decision to first address the management of seized cash, real property, and operating businesses before addressing a secondary objective of conveyances. While conveyances do represent nearly 75 percent of the total number of cases processed, they only represent 10 percent of the value of the assets held in the program. Low value vehicles seized along the border in alien smuggling activities represent an estimated 90 percent of all vehicles under the control of the Department, and perhaps no more than 5 percent of the value of all assets combined. Seized cash, businesses and real property collectively represent 70 percent of the value of all seized assets. These categories of assets are the most complicated to manage and represent the highest level of priority in the seizure program.

Although we recognize that our current seized asset and forfeiture information system needs to be upgraded to manage forfeiture operations effectively, we are able to provide accurate seizure caseload information from our present automated system despite the fact that GAO finds it inadequate. While the system hardware is limited in speed and capacity, it was inexpensive to develop, expeditiously placed into service and is still considered adequate to meet our short-term management information requirements while a second generation system is being developed. Likewise, the existing financial or accounting system is considered slow and in need of a major upgrading. The system will, however, meet management needs while the new automated accounting system is gradually expanded to cover all 94 United States marshals' district offices. The new system is being designed to provide financial information for individual forfeiture cases.

GAO points out that some Justice component organizations may be losing funds due to the absence of an accurate cost accounting system for prorating storage costs for seized property. This problem appears to apply only to vehicles forfeited administratively prior to establishment of the Assets Forfeiture Fund. Since agency expenses for vehicles are generated primarily by contracts for towing and storage, virtually all such expenses are now reimbursable from the Fund. Expedited administrative forfeiture procedures on the part of INS, and the issuance of sales and disposal contracts by the USMS during FY 1986 will reduce storage expenses and minimize vehicle deterioration, thereby enhancing the net return of proceeds to the Fund. Other than this problem, there are no particular issues of which we are aware in the storage or overall management of seized or forfeited assets. This is not to imply that all individual case problems will be eliminated, but potential future problems should be greatly minimized.

In all fairness to the GAO study, we recognize that establishment of the Department's asset seizure and forfeiture program coincided with GAO's study. It is understandable that the report would in part reflect issues, such as vehicles and system improvements, which by design were not fully addressed during the initial phases of program implementation. There is obviously a need to upgrade existing management and financial information systems and to address new legal issues and case law which will directly impact on the management and disposal of forfeited assets. However, a close examination of the program should reveal that the Department has established a comprehensive and workable seizure initiative which has extensive levels of management control and approval procedures designed to maintain program integrity and promote program uniformity and consistency.

GAO is currently undertaking a study of the Department's asset seizure and forfeiture program. Hopefully this GAO study will provide a more accurate and updated assessment of the overall seizure program that will be of more definitive value to the Department, the USMS, and the Congress.

Comments on Appendix VIII--Collection of Legal Process Debts

Appendix VIII of GAO's report discusses the Department's debt collection efforts and the need for better information and performance monitoring of all components involved in the collection of legal process debts. The collection of debts owed to the United States is one of the President's management priorities and the Attorney General has likewise designated it a priority for the Justice Department. It is included as one of the initiatives in the Department's Management and Productivity Plan. To assure proper oversight, the AAG/A has been directed to coordinate the Department's collection efforts, working closely with the United States Attorneys and the Department's legal divisions.

The GAO report states that the Department does not have a comprehensive management information system for its legal process debts, and United States attorneys' management and financial information is recorded by three separate systems--the Docket and Reporting System, the Prosecutors' Management Information System (PROMIS), and the United States Attorneys' Case Tracking System (USACTS). While the above is true, GAO fails to report the significance of the overall progress made since 1981. Over time, the Docket and Reporting System is being gradually replaced. Major management improvements have been made in handling and accounting for debt collection cases in United States attorneys' offices through installation of sophisticated office automation hardware and software and that installation process is still continuing. The computer-based PROMIS system has now been successfully implemented in 28 of the largest United States attorneys' offices. The small-office system, USACTS, which utilizes the records management capabilities of shared-logic word processing equipment, has now been successfully implemented in 27 of the smallest United States attorneys' offices.

These systems give the United States Attorneys, whose offices process approximately 99% of all individual payments of debt collection cases and criminal fines, the ability to automatically generate standard documents such as demand letters, complaints, garnishment papers, and receipts for payments. In addition, these systems give United States Attorneys the capability to accurately and completely capture data about their collection performance.

The Executive Office for United States Attorneys (EOUSA) was installing the above systems at the rate of three offices per month at an approximate cost of $20,000 per office. Under that schedule, all offices were to have been fully implemented by September 1987. Budgetary restrictions imposed by the Gramm-Rudman-Hollings Act will substantially curtail this initiative. In addition to the systems being installed in the United States attorneys' offices, the Department recently converted the Commercial Litigation Branch operations in the Civil Division to AMICUS II, a state-of-the-art system which should improve the Department's capability to monitor and collect the debts, fines, and judgments assigned the Civil Division for collection. In the long run, as additional funds become available, we look forward to automating more United States attorneys' offices and tying all of our systems together as part of the Department's current office automation and case management initiative.

With respect to the Department's recent efforts to improve its litigation of debts, we believe a review of the actions taken during 1985 reveal a number of significant accomplishments which evidence the Department's sustained commitment to improving the debt collection process. The actions were directed toward developing a central repository for definitive department-wide debt collection policies and procedures and providing stronger direction and oversight through improved automation, training and monitoring of all debt collection activities. A brief listing of a number of the actions taken in 1985 include:

1. Hired former District of Columbia Superior Court Judge Tim Murphy to head the EOUSA's debt collection staff. This staff is responsible for responding to numerous daily requests for information regarding debt collection policies and procedures, publishing a monthly newsletter for hands-on Debt Collection Unit personnel at each United States attorney district office, and conducting training conferences for United States attorney debt collection personnel.

2. Implemented the new Criminal Fine Enforcement Act of 1984. This included the transferring of responsibility for monitoring and collecting criminal fines from the Administrative Office of the United States Courts to the EOUSA's Debt Collection Units. Presently, the Department is in the process of implementing a centralized system to identify, track, and account for court-imposed criminal fines; issuing detailed policy statements, creating forms, and obtaining Imprest Funds for the processing of criminal fine monies; developing a standard financial status form for

probation officers to complete and share defendants' financial information useful to the courts and United States Attorneys; and providing guidance to United States Attorneys as to when specific enforcement techniques should be used and the time frames for using them.

3. Implemented a direct deposit or lockbox system. With the help of OMB and the Department of Treasury, a system was devised for sending debt collections daily to a lockbox. The bank operating the system sends the funds to Treasury the day after it receives them. Justice, thereafter, notifies the creditor agencies how much has been collected on their debts any how much is on deposit in Treasury. Approximately $1.2 million of interest is being saved annually by the immediate deposit of collections that were not deposited previously for weeks, and sometimes even months.

4. Completed the first draft of Title 11 of the United States Attorneys' Manual containing debt collection policies and procedures. The manual is currently being circulated for comment. Title 11 will now provide a one-source authoritative repository for all of the Department's debt collection policies and procedures. This means that all debt collection policies and procedures of the Department's legal divisions, as contained in the respective legal division titles of the United States Attorneys' Manual, have been recorded in Title 11. Also, the revised title contains a comprehensive chapter of all EOUSA policies and procedures for the handling of referred debt claims in United States attorneys' offices, from initial receipt to closing. This chapter serves to consolidate those policies and procedures previously transmitted by the EOUSA to all United States attorneys' offices. Finally, Title 11 includes an appendix containing exemplary pleadings, motions, memoranda, and other documents and correspondence relevant to the litigation of affirmative actions for recovery of money.

5. Held three debt collection training conferences. Basic instruction was given 150 inexperienced members and advanced instruction was given 60 experienced members of the Debt Collection Units.

6. Initiated action which led to issuance of the opinion interpreting the Criminal Fine Enforcement Act of 1984 such that the 20 year Statute of Limitations on collection of criminal fines will be applied retroactively.

7. Developed a Short Form Claims Collection Litigation Report for client agencies to use in referring debts to Justice for litigation.

8. Obtained use of credit bureau reports for use by the EOUSA Debt Collection Units.

9. Participated with five major clients in a debt reconciliation effort sponsored by OMB to reconcile differences in debt collection amounts reported by the Department and the referring agencies. Tapes are being provided each agency as the first step in an ongoing reconciliation process. Initial problems indicate that the Department of Education was reporting each referral as two separate debts--the principal and the interest. Other agency systems were reporting cases as being "at Justice" when they are in fact in the agency's own General Counsel's Office. The Department is taking steps to ensure that all agency file numbers are entered and are correct for all referrals in its custody.

In addition to the above, the following initiatives are underway or planned:

1. A Regional Specialist Program. This is a cadre of eight experienced debt collection personnel who provide support and on-site training to Debt Collection Units within their regions. This one-on-one intensive training is proving to be the Department's most productive program.

2. A pilot program with the Bureau of Prisons. This program is designed to encourage prison inmates to use their prison earnings to pay off debts owed the United States to improve their likelihood of early parole.

3. An Internal Revenue Service Tax Refund Program. This is an initiative that all of the components of the Department will participate in next year. Justice was not previously included in the highly successful pilot project, but we are proposing to include our criminal fine debtors in the offset program.

4. A debt collection video training package. The development of this video resource is not conceived as a permanent replacement for other training programs, but it is needed now as an immediate training medium, and can be used as a valuable supplemental tool in the future.

5. A bank credit card payment system. This is a pilot project in conjunction with the Department of the Treasury to design a system for the use of bank credit cards for the payment of magistrate fines. Hopefully, this additional payment vehicle will result in payments that would otherwise elude our collection efforts.

Finally, GAO expressed concern that the Department's 1981 and 1983 debt litigation improvement plans focused primarily on the United States Attorneys and did not include the legal divisions, which also have a key role in the collection of legal process debts. GAO's conclusion is correct, but the Department did so because the vast majority of the debts sent to Justice for collection are sent directly by the creditor agencies to the United States Attorneys in the districts where the debtors who are to be sued reside. Cash collection figures for FY 1985 show, for example, that collections by United States Attorneys account for nearly 85 percent of the total. Ninety-nine percent of all individual payments of debt collection cases and criminal fines are collected by Attorneys. Therefore, we concentrate our efforts where they will result in the greatest return. On the other hand, most of the debts, fines, and judgments collected by the legal divisions are those resulting from cases they litigate. Many of these judgments are against companies and individuals who either pay promptly, seek the protection of bankruptcy proceedings, or turn out to be judgment proof. Many of the more complex collection cases are generally assigned to lawyers experienced in creditors' rights and bankruptcy litigation in the Commercial Branch of the Department's Civil Division.

* * * * *

As a conclusion to our comments, we want to emphasize that the Department upholds a strong commitment to improving its management support systems and processes. We are making substantial progress, and by bringing the issue of better management to the forefront, we believe the impetus for sustained attention will continue. Management improvement is difficult, complex, and often risky, but it is too important to neglect and we at the Department have made it a priority issue.

Sincerely,

W. Lawrence Wallace
Assistant Attorney General
for Administration

QUESTION FROM SENATOR BIDEN

Question: In the fiscal 1988 budget, the criminal prosecution of civil rights violations is listed as the number one priority of the Civil Rights Division, yet vicious incidents of racial violence and intimidation are apparently on the rise. How do you explain this apparent increase in racial violence, and what steps does the Justice Department intend to take in response?

Answer: We do not have information on which to conclude that incidents of racial violence and intimidation are on the rise. Nevertheless, there is no doubt that such reprehensible acts occur all too frequently. This administration, therefore, has emphasized the prosecution of incidents of racial violence. For example in the past eighteen months 28 individuals affiliated with the Ku Klux Klan and other racial hate groups have been prosecuted on federal charges in the state of North Carolina alone. This figure includes 19 Klan members who were convicted for their part in racially motivated cross burnings and shootings in western North Carolina.

We are focusing our prosecution effort on the unlawful conduct of organized hate groups such as the Klan, the White Patriot Party, and the Order, following up on the successful federal prosecution in December 1985 of 23 members of the Order in Seattle, Washington. In addition, however, we are committed to investigating and prosecuting the numerous isolated acts of racial violence that regrettably occur throughout the country.

At the moment, we have 14 investigations involving racial violence either in or about to be in grand jury investigation. We have 125 other allegations of racial violence under either active investigation by the FBI or review by Civil Rights

Division prosecutors. Our commitment to prosecute racial violence cases is demonstrated by the fact that although racial violence complaints average only about five percent of the complaints investigated by the Civil Rights Division each year, over nineteen percent of the indictments obtained by that Division each year are in racial violence cases (average of FY 1981 through current FY to date).

QUESTIONS FROM SENATOR BIDEN

Follow-Up Question A: How many incidents of racial violence occurred in 1986 compared to 1985?

Follow-Up Question B: How many such incidents occurred in 1985 compared to 1984?

Follow-Up Question C: Do you know how many incidents of racial violence occurred during the first four years of the Reagan administration compared to during the four years of the Carter administration?

Follow-Up Question D: As part of the uniform crime report, does the Justice Department keep statistics on incidents of racial violence?

Follow-Up Question E: Given the heinous nature of such crimes and the devisive effect they have on our society -- and if preventing them is a Justice Department priority -- shouldn't you keep statistics on them?

Follow-Up Question F: How can you effectively combat racial violence if you don't even have an accurate picture of its extent and location?

Answer: There is no central repository for information on incidents of racial violence, and the Department does not keep comprehensive records on the total number of incidents of racial violence occurring throughout the country. Although Uniform Crime Reports do not identify racial violence offenses, the Civil Rights Division maintains data on complaints involving claims of racially motivated violence which are received by the Department. Based on that information, the number of complaints regarding incidents of racial violence received for 1984, 1985 and 1986 are set out below.

1984	162
1985	173
1986	180

These figures are based on a preliminary classification process.

Racial violence complaints related to housing numbered 482 for 1977-80, while the number for 1981-84 was 583. Comparative data for earlier racial violence matters other than those related to housing was not kept previously. From January 20, 1981, through January 31, 1987, the Department prosecuted 55 racial violence cases (137 defendants) of all types: 22 such cases (52 defendants) were prosecuted from 1977 through 1980.

We support in principle the collection of racial violence data. For many reasons, however, statistics regarding incidents of racial violence would be difficult to compile accurately. An accurate statistical approach is complicated for several reasons. First, it may be unclear whether racial animus is a factor in an incident. Second, the local classification of offenses having a racial aspect varies widely. Finally, there is an extraordinary range in the type and seriousness of conduct which can be classified as racially motivated (from racial epithets to verbal threats to vandalism to lynchings and firebombings).

Although statistical compilations may have value, they can never portray fully either the racial violence problem or the federal enforcement effort. For example, law enforcement misconduct incidents frequently include a racial aspect, but racial motivation is not an element of the potential federal civil rights offense (Section 242). As a result, racial violence statistics would not include a case such as United States v. Butler, in which on March 5, 1986, a white deputy sheriff was found guilty in Oxford, Mississippi of assaulting an elderly black prisoner.

ANTI-TRUST QUESTION FOR CHAIRMAN BIDEN

QUESTION #1: AMONG THE JUSTICE DEPARTMENT'S MANY ACTIVITIES, HOW IMPORTANT TO YOU IS ENFORCEMENT OF OUR ANTI-TRUST LAWS?

ANSWER: Preservation of a competitive economy is one of the highest priorities of this Administration and of the Department of Justice. The Department is committed to the fullest and most vigorous enforcement of our anti-trust laws, and we are confident that our record of enforcement bears this out.

Question from Senator Biden

Follow-up Question A

If antitrust enforcement is so important to you, then why is it that the position of Assistant Attorney General for Antitrust has been vacant for almost half of the time that you have served as Attorney General ?

Follow-up Question B

When do you expect to send a nomination for the Antitrust Division to the Senate ? Don't you anticipate there will be problems getting someone qualified to serve if you wait much longer ?

Response

The key role of the Department's antitrust enforcement program in ensuring a competitive economy has made it imperative that our consideration of candidates for the Assistant Attorney General's position be as thorough and painstaking as possible. In addition, necessary FBI background checks are time-consuming, particularly now that the Iran-contra investigations have placed a substantial strain on the Bureau's investigative resources. As a result, the position of head of the Antitrust Division has been vacant on two occasions, following Assistant Attorney General McGrath's return to private practice and Judge Ginsburg's nomination to the U.S. Court of Appeals for the D.C. Circuit. The Division has not been rudderless during these periods, however. Charles F. Rule has performed with the highest distinction as acting head of the Division on both of these occasions, providing strong and effective leadership in implementing the President's antitrust program. It is simply inaccurate to assert that the Division and its enforcement activities have suffered under his stewardship.

As to the present vacancy, it is anticipated that the President will be submitting a nomination to the Senate in the near future. The concerns expressed in the question about obtaining a qualified nominee for the remainder of the Administration are, in any case, misplaced. The Attorney General has been very pleased by the range of exceptionally qualified people who have expressed interest in the position, and we are confident that the President will have no difficulty whatever in submitting an eminently qualified nominee for this important post.

Question from Senator Biden

UNDER THE GENERAL AUTHORIZATION PROVISION OF YOUR BILL, YOU ARE REQUESTING A $20,000 FUND FOR "UNUSUAL EXPENSES NECESSARY IN THE COLLECTION OF EVIDENCE..." CAN YOU EXPLAIN THE NECESSITY FOR THIS NEW AUTHORITY?

The request for this authority is not new and evolves from previously enacted legislation. The need for this authority emanates from circumstances where, in the process of a criminal investigation or prosecution, a need arises where an expenditure of funds is clearly within the interest of the United States, but the expenditure does not fall within one of the general authorities. The provision provides limited flexibility to respond to these circumstances.

Question from Senator Biden

UNDER THE ACCOUNTS FOR FBI, DEA, AND INS, THERE ARE REQUESTS FOR FUNDS TO BE USED FOR UNFORESEEN EMERGENCIES OF A CONFIDENTIAL CHARACTER, TO BE EXPENDED UNDER THE DIRECTION OF THE ATTORNEY GENERAL. IF NECESSARY, IN A CLOSED SESSION, I WOULD LIKE TO KNOW FOR WHAT PURPOSES THESE FUNDS HAVE BEEN USED IN THE PAST THREE FISCAL YEARS.

The Department can provide information regarding this inquiry under the Committee's and Department's procedures regarding the handling of sensitive information.

Question from Senator Biden

IF WE WERE TO ENACT INTO PERMANENT LAW GENERAL AUTHORITIES FOR THE ATTORNEY GENERAL, PROPOSED IN SECT. 577(a), (b) and (c), WHAT EFFECT WOULD THIS HAVE ON THE ATTORNEY GENERAL"S ABILITY TO REPROGRAMS (sic) OR SHIFT FUNDS THROUGHOUT THE DEPARTMENT WITHOUT NOTIFICATION OR CONGRESSIONAL ACTION?

We do not believe that there would be any change in the Department's obligation to notify Congress in reprogramming circumstances.

Question from Senator Biden

WOULD YOU BE AMENDABLE TO CONSIDER ADDITIONAL REPORTING REQUIRMENTS IMPOSED BY CONGRESS IN EXCHANGE FOR PERMANENT AND/OR TWO YEAR AUTHORIZATIONS?

The Department does not object to reporting requirments that are not burdensome and serve the legitimate interests of Congress' oversight function. We seek to work with the Committee to ensure that any reporting requirment would make effective use of existing internal management and control structures and that the reports produce timely information of value to the Committee.

Question from Chairman Biden

"I believe it would be beneficial if we had a listing of all current reports and studies that the Department is required to provide Congress as well as the date they are due."

Response

Rule III, clause 2 of the Rules of the U.S. House of Representatives provides that at the commencement of each regular session of Congress the Clerk of the House must submit a complete list of the reports that each officer or Department is required to submit to the Congress. I have attached a copy of the portion of the latest such list pertaining to the Department of Justice. As you can see, it is quite voluminous. Many of the reports required are redundant, obsolete, or of limited relevance to the current work of the Department and interests of Congress. Moreover, the sheer volume of reporting required is a serious burden on the Department's litigating and law enforcement divisions and agencies, which must redirect scarce manpower and resources away from enforcing the laws Congress has enacted simply to satisfy onerous reporting requirements--surely a lower priority.

Last year Congress passed legislation to eliminate some of the most egregious examples of unnecessary paperwork, but we feel that more can be done to streamline or eliminate existing requirements. The Department is currently reviewing the present required reports to identify those which, in our view, are obsolete, unduly burdensome, or irrelevant to present Legislative and Executive Branch concerns. When our review is complete, we look forward to working with the Judiciary Committee on legislation that will alleviate an unnecessary burden on the Department while preserving Congress' access to needed information.

99th Congress, 1st Session - - - - - - - - - House Document No. 99-9

REPORTS TO BE MADE TO CONGRESS

COMMUNICATION

FROM

THE CLERK,
U.S. HOUSE OF REPRESENTATIVES

TRANSMITTING

A LIST OF REPORTS WHICH IT IS THE DUTY OF ANY OFFICER OR DEPARTMENT TO MAKE TO CONGRESS, PURSUANT TO RULE III, CLAUSE 2, OF THE RULES OF THE HOUSE OF REPRESENTATIVES

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January 3, 1985—Referred to the Committee on House Administration and ordered to be printed

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DEPOSITORY

LETTER OF TRANSMITTAL

House of Representatives,
Office of the Clerk,
Washington, D.C., January 3, 1985.

Hon. Thomas P. O'Neill, Jr.,
The Speaker, House of Representatives,
Washington, D.C.

Dear Mr. Speaker: In compliance with the requirements of clause 2, rule III of the Rules of the U.S. House of Representatives, I have the honor to submit herewith a list of reports which it is the duty of any officer or department to make to Congress.

With kind regards, I am
Sincerely,

Benjamin J. Guthrie,
Clerk, U.S. House of Representatives.

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ABBREVIATIONS USED

AEA	Atomic Energy Act of 1954
AECA	Arms Export Control Act
CAA	Clean Air Act
DPA	Defense Production Act
EOA	Economic Opportunity Act of 1964
EPCA	Energy Policy and Conservation Act
ESEA	Elementary and Secondary Education Act
FAA	Foreign Assistance Act of 1961
FEAA	Federal Energy Administration Act of 1974
FPA	Federal Power Act
FWPCA	Federal Water Pollution Control Act
GEPA	General Education Provisions Act
HEA	Higher Education Act of 1965
INA	Immigration and Naturalization Act
IRC	Internal Revenue Code of 1954
PHSA	Public Health Service Act
RS	Revised Statutes
SBA	Small Business Act
SSA	Social Security Act
SWDA	Solid Waste Disposal Act
VEA	Vocational Education Act

COMMITTEE CODE IDENTIFICATIONS

The two-character codes below, when they appear in the column headed "Committees", indicate that the statute requires the report in question to be submitted directly to the cited committee.

AC	"Appropriate committees"
AG	Agriculture
AP	Appropriations
AS	Armed Services
BA	Banking, Finance and Urban Affairs
BU	Budget
DC	District of Columbia
ED	Education and Labor
EC	Energy and Commerce
FA	Foreign Affairs
GO	Government Operations
HA	House Administration
II	Interior and Insular Affairs
JT	Joint Committee on Taxation
JU	Judiciary
MM	Merchant Marine and Fisheries
PO	Post Office and Civil Service
PW	Public Works and Transportation
RU	Rules
ST	Science and Technology
SM	Small Business
SO	Standards of Official Conduct
VA	Veterans Affairs
WM	Ways and Means
PI	Perm. Select Com. on Intelligence

Footnotes set forth below refer to various types of legislative veto provisions.

[1] One-House veto.
[2] Approval by Committees of both Houses.
[3] Two-House veto.
[4] Two-House approval.
[5] One-Committee veto.
[6] Two-Committee veto.
[7] Other miscellaneous types of legislative veto.

NOTE: The Supreme Court has declared one[1] and two[2] House legislative vetoes unconstitutional because they violate the "presentment" clause of the Constitution (Article I, Section 7) and the separation of powers doctrine. We have continued to note reporting requirements with legislative veto provisions until the Court determines the question of "severability".

[1] *Immigration and Naturalization Service* v. *Chadha.*
[2] *Consumer Energy Council of the United States* v. *Federal Energy Regulatory Commission; Consumers Union of the United States* v. *Federal Trade Commission.*

PRINCIPAL SUBJECT TERMS

In specific sections of this publication, (General Accounting Office, President, Cabinet-level Departments, District of Columbia, Environmental Protection Agency, Federal Emergency Management Agency and Veterans' Administration) the requirements are categorized using the applicable subject terms listed below:

ABORTION, BIRTH CONTROL, AND FAMILY PLANNING
ADVERTISING AND MARKETING
ADVISORY BODIES
AGED
AGRICULTURE AND RURAL AFFAIRS
ALCOHOL AND ALCOHOLIC BEVERAGES
ANIMALS AND ANIMAL PROTECTION
ANTITRUST
ARMED FORCES AND UNIFORMED SERVICES
ATOMIC ENERGY AND POWER
AUDITS
AVIATION

BANKRUPTCY AND INSOLVENCY
BANKS AND BANKING
BUSINESS AND COMMERCE

CELEBRATIONS, HOLIDAYS, AND SPECIAL OBSERVANCES
CEMETERIES AND FUNERALS
CENSUS AND STATISTICS
CHILDREN AND YOUTH
CIVIL RIGHTS AND LIBERTIES
CLAIMS AND GOVERNMENT LIABILITY
COMMEMORATIONS AND TRIBUTES
COMMUNICATIONS AND BROADCASTING
CONGRESS AND MEMBERS OF CONGRESS
CONSTITUTION AND CONSTITUTIONAL AMENDMENTS
CONSUMER AFFAIRS AND PROTECTION
CORPORATIONS AND STOCKS
CORRECTIONS AND CORRECTIONAL INSTITUTIONS
COURTS AND CIVIL PROCEDURE
CRIMES AND CRIME PREVENTION
CRIMINAL PROCEDURE AND SENTENCING
CULTURE AND CIVILIZATION

DEPARTMENT OF AGRICULTURE
DEPARTMENT OF COMMERCE
DEPARTMENT OF DEFENSE
DEPARTMENT OF EDUCATION
DEPARTMENT OF ENERGY
DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
DEPARTMENT OF THE INTERIOR
DEPARTMENT OF JUSTICE
DEPARTMENT OF LABOR
DEPARTMENT OF STATE
DEPARTMENT OF TRANSPORTATION
DEPARTMENT OF THE TREASURY
DISASTERS AND DISASTER RELIEF
DOMESTIC RELATIONS AND FAMILIES
DRUGS AND NARCOTICS

ECONOMIC POLICIES AND CONDITIONS
EDUCATION AND SCHOOLS
ELECTIONS AND VOTING
ENERGY
ENVIRONMENTAL PROTECTION AND CONSERVATION
EXECUTIVE BRANCH AND AGENCIES

FEDERAL EMPLOYEES AND OFFICIALS
FIREARMS AND EXPLOSIVES
FIRES AND FIRE FIGHTERS
FISH AND FISHERIES
FOOD AND FOOD INDUSTRY
FOREIGN RELATIONS AND POLICY
FOREIGN TRADE AND INVESTMENTS
FORESTS AND FOREST PRODUCTS

GAMBLING AND LOTTERIES
GOVERNMENT RECORDS, DOCUMENTS, AND INFORMATION

HANDICAPPED
HEALTH AND MEDICAL CARE
HEALTH AND MEDICAL FACILITIES
HEALTH AND MEDICAL PERSONNEL
HISTORIC SITES AND PRESERVATION
HOUSE OF REPRESENTATIVES
HOUSING AND HOUSING FINANCE

IMMIGRATION AND ALIENS
INCOME TAX
INDIANS AND NATIVE AMERICANS

LABOR AND EMPLOYMENT
LAW ENFORCEMENT AND POLICE
LAWYERS AND LEGAL SERVICES
LIBRARIES
LICENSING AND REGISTRATIONS
LOCAL AND MUNICIPAL GOVERNMENT

MINES AND MINING
MINORITIES
MONEY AND MONETARY POLICY
MONUMENTS AND MEMORIALS
MOTOR VEHICLES AND DRIVING

NATIONAL SECURITY AND INTELLIGENCE OPERATIONS
NATIONAL SYMBOLS AND EMBLEMS
NEWSPAPERS AND PERIODICALS

OLD AGE, SURVIVORS AND DISABILITY INSURANCE

PARKS AND NATURAL AREAS
PATENTS, TRADEMARKS, AND COPYRIGHTS
PETROLEUM AND PETROLEUM PRODUCTS
POSTAL SERVICES AND FACILITIES
PRESIDENTS AND VICE PRESIDENTS
PUBLIC BUILDINGS AND FACILITIES
PUBLIC CONTRACTS, PROCUREMENT, AND PROPERTY
PUBLIC FINANCE AND BUDGETS
PUBLIC LANDS AND REAL PROPERTY
PUBLIC SAFETY
PUBLIC WELFARE AND CHARITIES

RAILROADS AND RAIL FACILITIES
RECREATION AND RECREATIONAL FACILITIES
RELIGION AND CLERGY
ROADS, HIGHWAYS, AND PARKWAYS

SCIENCE AND TECHNOLOGY
SECURITIES AND INVESTMENTS
SENATE
SHIPS AND SHIPPING
SOCIAL SECURITY PROGRAM
SPACE
SPORTS AND ATHLETICS
STATES

TAXATION
TERRITORIES AND POSSESSIONS OF THE U.S.
TIME AND CALENDARS
TRANSPORTATION AND TRAVEL
TREATIES AND INTERNATIONAL AGREEMENTS

URBAN AFFAIRS

VETERANS

WATER AND WATER RESOURCES DEVELOPMENT
WEATHER AND CLIMATE
WOMEN AND WOMEN'S RIGHTS

LIST OF REPORTS WHICH IT IS THE DUTY OF ANY OFFICER OR DEPARTMENT TO MAKE TO CONGRESS

PART III.—BY THE PRESIDENT OF THE UNITED STATES—Continued

C. REPORTS BY CABINET-LEVEL DEPARTMENTS TRANSMITTED BY THE PRESIDENT—Continued

Nature of report	Authority	When expected to be made	Committees
Department of Housing and Urban Development			
Activities of the Department	42 U.S.C. 3536	Annually	
Report on programs including insurance, public housing, and rent supplement	12 U.S.C. 1701o	do	
Amount of loans, contributions, and grants contracted for, and information with respect to builders' cost certifications required by § 227 of the National Housing Act.	12 U.S.C. 1701p	do	
Operations under the National Flood Insurance Act of 1968	42 U.S.C. 4027	Biennially	
Administration of the National Mobile Home Construction and Safety Standards Act of 1974	42 U.S.C. 5425	Biennially, on July 1	
Department of the Interior			
Status of the Natives and Native groups in Alaska, and a summary of actions taken under the Alaska Native Claims Settlement Act.	43 U.S.C. 1622	When Congress convenes in 1985	
Fort Jefferson National Monument, recommendations designating portions of as wilderness	Pub. L. 96-287, § 203 (94 Stat. 601)	September 30, 1983	
National wilderness preservation system (see joint reports)	16 U.S.C. 1136	Opening session of each Congress	
Recommendations for designating additions to the National Wild and Scenic Rivers System	16 U.S.C. 1276(a)(60)-(61), (65)-(72)	September 30, 1984	
Wildcat Brook Wild and Scenic River Study	16 U.S.C. 1276(a)(59)	Interim report by June 19, 1987; final report by June 19, 1990.	
Recommendations for designating as wilderness certain public lands previously identified	43 U.S.C. 1782(b)	From time to time	
Review of land withdrawals existing on October 21, 1976, and recommendations for continuation or termination of such withdrawals.	43 U.S.C. 1714(c)(1), (2)	By October 21, 1991	(9)
Nation wide outdoor recreation plan	16 U.S.C. 4601-1(c)	Every 5 years (next report due in 1988)	
Department of Justice			
Proceedings under the Trading with the Enemy Act	50 U.S.C. app. 6	Annually, on April 1	
Department of Labor			
Federal Coal Mine Health and Safety Act of 1969	30 U.S.C. 958(a)	Annually, within 120 days after Congress convenes.	
Federal agency safety programs and responsibilities	29 U.S.C. 668(b)	Annually	
Occupational Safety and Health Act of 1970	29 U.S.C. 675	Annually, 120 days after Congress convenes.	
Department of Transportation			
Activities of the Department	49 U.S.C. 308(a)	Annually	
Administration of the National Traffic and Motor Vehicle Safety Act of 1966	15 U.S.C. 1408	Annually, on March 1	
Administration of the Highway Safety Act of 1966	23 U.S.C. 401	do	
Administration of the Federal Railroad Safety Act of 1970	45 U.S.C. 440	Annually, by July 1	
Transportation of hazardous materials	49 U.S.C. app. 1808(e)	Annually, May 1	
Administration of the Alaska Railroad	43 U.S.C. 975	Annually	
Public education program to promote van pooling and car pooling	42 U.S.C. 6364(c)	do	
Cabinet-Level—Joint Responsibility			
Secretaries of Interior and Agriculture: National Wilderness Preservation System	16 U.S.C. 1136	Beginning of each regular session	
Secretaries of Transportation and HUD: How Federal policies and programs can assure that the urban transportation systems effectively serve both national transportation needs and the comprehensiveplanned development of urban areas.	49 U.S.C. 304(b)	Annually, on April 1	

LIST OF REPORTS WHICH IT IS THE DUTY OF ANY OFFICER OR DEPARTMENT TO MAKE TO CONGRESS

PART IV.—REPORTS BY THE CABINET LEVEL DEPARTMENTS

A.—9. DEPARTMENT OF JUSTICE

Nature of report	Authority	When expected to be made	Committees
Department of Justice			
Business and Commerce			
Monopolistic activities under the Interstate Compact to Conserve Oil and Gas	Pub. L. 94-498, § 3(a)	Biennially	
Surveys of any activity of the Government which may affect small business	SBA, § 10(c)(2)	Annually	
Children and Youth			
Names of all persons upon whom the President has conferred the Young American Medal for Bravery, and the Young American Medal for Service.	Act of August 3, 1950, ch. 520, § 5	At the end of fiscal year	
Prosecutions, convictions, and forfeitures with respect to sexual exploitation of children	Pub. L. 98-292, § 9	By September 18, 1984; annually thereafter.	
Civil Rights and Liberties			
Activities under the Civil Rights of Institutionalized Persons Act	42 U.S.C. 1997f (Pub. L. 96-247, § 8)	Annually, by April 1 (with annual report of the Department).	
Claims and Government Liability			
Claims for damages caused by the F.B.I.	31 U.S.C. 3724(b)	Upon settlement	
Constitution and Constitutional Amendments			
Any decision on constitutional grounds not to enforce, or to contest or not defend, any law enacted by Congress.	Pub. L. 96-132, § 21; Pub. L. 98-411, § 203(a) (98 Stat. 1558).	Within 30 days (Authority expires end of Fiscal Year 1985).	
Consumer Affairs and Protection			
Extortionate credit transactions	Pub. L. 90-321, § 208	At the end of fiscal year	
Activities under the Equal Credit Opportunity Act	Pub. L. 90-321, § 707 (90 Stat. 255; 94 Stat. 174).	Annually	
Corrections and Correctional Institutions			
Federal Prison Industries, Inc	18 U.S.C. 4127	do	
Courts and Civil Procedure			
Study of the Dispute Resolution Program	Pub. L. 96-190, § 8(l)	By April 1, 1984	
Administration of the Dispute Resolution Act	Pub. L. 96-190, § 8(d)	By February 12, 1981, and annually by February 1 thereafter.	JU
Use of search warrants by Federal officers for certain documents	Pub. L. 96-440, § 201(b)	Annually	
Deposits and expenditures of the Department of Justice Assets Forfeiture Fund	28 U.S.C. 524(c)(5)	Annually, by January 31	JU
Effectiveness of the State Justice Institute in carrying out its specified duties	42 U.S.C. 10712	By October 1, 1987	
Crimes and Crime Prevention			
Report regarding any laws necessary to ensure that no Federal felon profits from the criminal offense until any victim receives restitution.	Pub. L. 97-291, § 7		
Prosecutions under 18 U.S.C. 1029 (Fraud and related activity in connection with access devices)	18 U.S.C. 1029 nt	Annually in 1985, 1986 and 1987	
Prosecutions under 18 U.S.C. 1030 (Fraud and related activity in connection with computers)	18 U.S.C. 1030 nt	Annually, 1985, 1986, 1987	
Victims Compensation Fund payments	18 U.S.C. 3525(b)	Annually, by January 31	
Emergency Federal Law Enforcement Assistance	42 U.S.C. 10509	Annually, by April 1st	
Revenues deposited in the Crime Victims Fund and the effectiveness of victim compensation and assistance.	42 U.S.C. 10604(h)	By December 31, 1987	

LIST OF REPORTS WHICH IT IS THE DUTY OF ANY OFFICER OR DEPARTMENT TO MAKE TO CONGRESS

PART IV.—REPORTS BY THE CABINET LEVEL DEPARTMENTS—Continued

A.—9. DEPARTMENT OF JUSTICE—Continued

Nature of report	Authority	When expected to be made	Committees
Activities of Title I of the Omnibus Crime Control and Safe Streets Act (Law Enforcement Assistance).	42 U.S.C. 3789	Annually, by April 1st	
Criminal Procedure and Sentencing			
Decisions not to prosecute violations of Federal law in which there is a possibility that classified information will be revealed.	Pub. L. 96-456, § 13(a)	Semiannually	PI, JU
Extent to which internal operating guidelines for the direction of investigative and prosecutorial activities have been relied upon for due process challenges.	Pub. L. 98-473, § 1211 (98 Stat. 2164)	By October 11, 1985	
Drugs and Narcotics			
Enforcement activities with respect to robberies and burglaries involving controlled substances	Pub. L. 98-305, § 4	Annually, until 1987	
Education and Schools			
Possibility of recovering costs of carrying out the Asbestos School Hazard Detection and Control Act of 1980.	Pub. L. 96-270, § 9(b)	By June 14, 1981	
Government Records, Documents, and Information			
Disposition of cases listed in HHS Inspector General's annual report as having been referred to the Justice Department.	Pub. L. 94-505, § 204(a) (91 Stat. 1103)	Promptly after receiving report	
Reasons for removal of the Special Investigator of the Immigration and Naturalization Service	Pub. L. 96-132, § 23(b)(2)	In any case	
Business of the Department of Justice for the last preceding fiscal year	28 U.S.C. 522	Annually, by April 1	
Activities and operations of the Public Integrity Section	28 U.S.C. 529 (92 Stat. 1871)	At the beginning of each regular session of Congress	
Law Enforcement and Police			
Community Relations Service	Pub. L. 88-352, § 1004	Annually, by January 31	
Federal law enforcement and criminal justice assistance activities	Pub. L. 90-351, § 670 (84 Stat. 1899; 87 Stat. 218).	Biennially	
Money and Monetary Policy			
Administration of the Electronic Fund Transfer Act	Pub. L. 90-321, § 918 (92 Stat. 3740)	Annually, by May 10	
National Security and Intelligence Operations			
Administration of the Foreign Agents Registration Act of 1938, as amended	Act of June 8, 1938, ch. 327, § 11 (56 Stat. 258).	From time to time (annually by practice).	
Minimization procedures to be used in electronic surveillance to acquire foreign intelligence	Pub. L. 95-511, § 102(a)(1)	30 days in advance of surveillance; or immediately if advance notice is waived.	PI
Assessments of minimization procedures used in electronic surveillance for foreign intelligence purposes.	Pub. L. 95-511, § 102(a)(2)	In each case	PI
Electronic surveillance for foreign intelligence purposes	Pub. L. 95-511, § 107	Annually, in April	
Use of electronic surveillance in the U.S. for foreign intelligence purposes	Pub. L. 95-511, § 108(a)	Semiannually	PI
Operation and effectiveness of the Classified Information Procedures Act	Pub. L. 96-456, § 13(b)	Annually during 1982 and 1983, and as necessary thereafter.	AC
Public Contracts, Procurement, and Property			
Studies of voluntary agreements under § 708 of the Defense Production Act	Act of September 8, 1950, ch. 932, § 708(k) (89 Stat. 810).	Annually	

LIST OF REPORTS WHICH IT IS THE DUTY OF ANY OFFICER OR DEPARTMENT TO MAKE TO CONGRESS

PART IV.—REPORTS BY THE CABINET LEVEL DEPARTMENTS—Continued

A.—9. DEPARTMENT OF JUSTICE—Continued

Nature of report	Authority	When expected to be made	Committees
Identical bidding in advertised public procurement	Executive Order No. 10936, § 7	do	
Railroads and Rail Facilities			
Investigation of whether rail carriers should continue to be subject to 49 U.S.C. 11707	Pub. L. 96-448, § 210(d)	No time specified	
Bureau of Justice Assistance			
Activities of Title I of the Omnibus Crime Control and Safe Streets Act (Law Enforcement Assistance).	42 U.S.C. 3789	Annually, by April 1st	
Bureau of Justice Statistics			
Information on justice statistics	Pub. L. 90-351, § 302(c)(10) (93 Stat. 1176).	No time specified	
Drug Enforcement Administration			
Financial audit of each undercover investigative operation which is closed in FY 1985	Pub. L. 98-411, § 203(b)(4)(A)	180 days after operation is closed (FY 1985).	
Number of undercover investigative operations pending, commenced and closed	Pub. L. 98-411, § 203(b)(4)(B)	Annually	
Intelligence activities	Act of July 26, 1947, ch. 343, § 501(a)(1) (94 Stat. 1981).	Keep (Committee) fully and currently informed.	PI
Illegal intelligence activity; significant intelligence failure; corrective action	Act of July 26, 1947, ch. 343, § 501(a)(2) (94 Stat. 1981).	In timely fashion	PI
Federal Bureau of Investigation			
Financial audit of each undercover investigative operation which is closed in FY 1985	Pub. L. 98-411, § 203(b)(4)(A)	180 days after operation is closed (FY 1985).	
Number of undercover investigative operations pending, commenced and closed	Pub. L. 98-411, § 203(b)(4)(B)	Annually	
Intelligence activities	Act of July 26, 1947, ch. 343, § 501(a)(1) (94 Stat. 1981).	Keep (Committee) fully and currently informed.	PI
Illegal intelligence activity; significant intelligence failure; corrective action	Act of July 26, 1947, ch. 343, § 501(a)(2) (94 Stat. 1981).	In timely fashion	PI
Foreign Claims Settlement Commission of the United States			
Operations under the War Claims Act of 1948, as amended	Act of July 3, 1948, ch. 826, § 2(f) (79 Stat. 1312); Pub. L. 96-209, § 101.	Annually, by December 31	
Operations under the International Claims Settlement Act of 1949, as amended	Act of March 10, 1950, ch. 54, § 3(c) (79 Stat. 1312); Pub. L. 96-209, § 101.	do	
Immigration and Naturalization Service			
Waivers granted from certain admissibility requirements for refugees	INA, § 207(c)(3) (94 Stat. 103)	Annually	
Admission of aliens who were affiliated with certain subversive organizations and who have established opposition to such subversion.	INA, § 212(a)(28)(I)(ii)(b) (66 Stat. 182)	Promptly upon admission of alien	
Suspension of deportation of certain aliens of good character and with required residency when deportation causes hardship under § 244(a), Immigration and Nationality Act.	INA, § 244(c) (66 Stat. 214, 76 Stat. 1247).	1st day of each month when in session	(1)
Withdrawals of suspension of deportation previously granted an alien	INA, § 246(a) (66 Stat. 217)	On the 1st and 15th day of each month when in session.	

LIST OF REPORTS WHICH IT IS THE DUTY OF ANY OFFICER OR DEPARTMENT TO MAKE TO CONGRESS

PART IV.—REPORTS BY THE CABINET LEVEL DEPARTMENTS—Continued

A.—9. DEPARTMENT OF JUSTICE—Continued

Nature of report	Authority	When expected to be made	Committees
Adjustment of status of a non-immigrant to that of an alien lawfully admitted for permanent residence.	Pub. L. 85-136, § 13(c)	1st day of each month when in session	
National Drug Enforcement Policy Board			
Illegal drug law enforcement policy and plans	21 U.S.C. 1204	By July, 1985; biannually thereafter	
National Institute of Justice			
Activities of Title I of the Omnibus Crime Control and Safe Streets Act (Law Enforcement Assistance).	42 U.S.C. 3789	Annually, by April 1st	
State of justice research	Pub. L. 90-351, § 202(c)(9) (90 Stat. 1172)	Biennially	
Office of Justice Programs			
Annual report	42 U.S.C. 3712(b)	Annually, by March 31	
Office of Juvenile Justice and Delinquency Prevention			
Analysis and evaluation of, and comprehensive plan for Federal juvenile delinquency programs; research, demonstration, training, and evaluation programs.	Pub. L. 93-415, § 204(b)(5) (91 Stat. 1049) & § 246.	Annually, by December 31	
Special Prosecutor			
Statements of reports of activities	28 U.S.C. 595(a)	From time to time	
Any substantial and credible information .... that may constitute grounds for an impeachment	28 U.S.C. 595(c)	As appropriate	

LIST OF REPORTS WHICH IT IS THE DUTY OF ANY OFFICER OR DEPARTMENT TO MAKE TO CONGRESS

PART IV.—REPORTS BY THE CABINET LEVEL DEPARTMENTS—Continued

B. CABINET-LEVEL—JOINT RESPONSIBILITY—Continued

Nature of report	Authority	When expected to be made	Committees
Railroads and Rail Facilities			
Secretary of Transportation and the National Railroad Passenger Corporation: Evaluation of rail passenger corridors.	Pub. L. 91-518, § 1008 (94 Stat. 416)	By February 15, 1981	
Science and Technology			
Secretaries of Agriculture and Commerce: Status of research and development	7 U.S.C 178m (Pub. L. 96-592, § 15 (98 Stat. 1841)).	Annually, by December 31 until 1987	
Ships and Shipping			
Secretaries of Transportation, Justice, and Chairman of the Federal Trade Commission: Impact of the Shipping Act of 1984 upon the international ocean shipping industry.	Pub. L. 98-237, § 18(c)(2)	By November 19, 1989	
Space			
Secretary of Commerce and Administrator of NASA: Unified national plan for remote-sensing research and development applied to the Earth and its atmosphere; progress of relevant ongoing R and D activities; and an assessment of the state of our knowledge.	15 U.S.C. 4281(e)	By July 17, 1985; biennially thereafter	
Transportation and Travel			
Secretary of Transportation and Commissioner of ICC: Study on bus terminals	Pub. L. 97-261, § 26(a)	By December 31, 1983	
Veterans			
Administrator of VA and Director of Office of Personnel Management: Status of recommendations made in the 1982 report entitled "Study of the Feasibility and Desirability of Converting Selected Health Care Occupations to title 38, U.S. Code".	Pub. L. 98-160, § 207(a)(1)	By January 1, 1984	VA
Secretary of Defense and Administrator of the Veterans' Administration: veteran training and rehabilitation, educational assistance, and related programs.	38 U.S.C. 1642 (96 Stat. 1207)	Annually by January 15	
Administrator of Veterans' Affairs and the Attorney General: Implementation of use of attorneys in court to foreclose loans to veterans' small business concerns under 38 U.S.C. 1830.	38 U.S.C. 1830 et	By February 1985	
Administrator of the Veterans' Administration and the Secretary of Defense: recommendations and guidelines to promote the sharing of health care resources.	38 U.S.C. 5011(f)	Annually	

LIST OF REPORTS WHICH IT IS THE DUTY OF ANY OFFICER OR DEPARTMENT TO MAKE TO CONGRESS

PART V.—REPORTS BY EACH EXECUTIVE OFFICE AND CABINET-LEVEL DEPARTMENT

Nature of report	Authority	When expected to be made	Committees
Each Executive Office and Cabinet-Level Department			
Analysis, appraisal, and evaluation of the application, administration, and execution of laws enacted by Congress.	Act of August 1, 1946, ch. 753, § 136(a)	Whenever requested by a Committee of Congress.	
Any omission from contracts of a clause authorizing review by the Comptroller General of pertinent books and records of the contractor or his subcontractors where the agency head determines that the public interest would be best served by such omission when such contracts are negotiated with foreign contractors.	Act of June 30, 1949, ch. 288, § 304(c) (80 Stat. 850).	When clause omitted	
Any omission from contracts of a clause authorizing review by the Comptroller General of pertinent books and records of the contractor or his subcontractors where the agency head determines that the public interest would be best served by such omission when such contracts are national defense contracts.	Pub. L. 85-804, § 3(b)	do	
Arms control impact statements	Pub. L. 87-297, § 36(b)(2) (92 Stat. 458)	Required, when pertinent, in all reports to Congress	
Environmental impact statements	Pub. L. 91-190, § 102(2)(C)	do	
Any recommendation or request which would, in the judgment of the Secretary of the Interior, have an adverse effect on the Chattahoochee River National Recreation Area.	Pub. L. 95-344, § 104(b)	60 days in advance	II
Comments and recommendations regarding the report of the Commission on Civil Rights on its study of racial and ethnic discrimination in programs for older Americans.	Pub. L. 96-478, § 303(b)	Within 45 working days after receiving report which is due by April 18, 1980.	
Costs of retrofitting and other energy conservation measures	Pub. L. 95-619, § 549	In each authorization and appropriation request.	
Any recommendation or request which would, in the judgment of the Secretary of the Interior, have an adverse effect on the New River Gorge National River.	Pub. L. 95-625, § 1107	At time of recommendation or request	
Waivers of minimum funding and staffing requirements for technology transfer from Federal laboratories.	Pub. L. 96-480, § 11(b)	When President submits budget	
Statement of reasons for failing to submit data to be included in the Geographic Distribution of Federal Funds Report.	Pub. L. 97-326, § 11(b)	December 15, 1982 for Fiscal Year 1981, February 15, 1983 for Fiscal Year 1982.	HA
Compilation of data included in the Geographic Distribution of Federal Funds Report	Pub. L. 97-326, § 11(2)	do	
Reasons for not complying with the deadline in the project decision schedule for the operation of a nuclear waste repository.	Pub. L. 97-425, § 114(e)(2)	In each case	
Disposal of Federal tract or lands with environmental or economic value	Pub. L. 98-146, § 314	In each case (FY 1984)	
Any omission from contracts of a clause authorizing review by the Comptroller General of pertinent books and records of the contractor or his subcontractors where the agency head determines that the public interest would be best served by such omission when such contracts are military procurement contracts.	10 U.S.C. 2313(c)	When clause omitted	
All requests for authorizing legislation for a fiscal year	31 U.S.C. 1110	By May 15 of year prior to fiscal year	
Obligation or expenditure of funds in excess of amounts available in an appropriation or fund in advance of an appropriation or exceeding the limitation on voluntary services (violation of 31 U.S.C. 1341(a) or 1342).	31 U.S.C. 1351	Immediately when violation occurs	AP
Expenditure or obligation in excess of appropriation or apportionment	31 U.S.C. 1517(b)	do	
Compliance with the requirements of the internal accounting and administrative control system	31 U.S.C. 3512(c)(3)	By December 31, 1983, annually by December 31 thereafter.	
Action taken on a recommendation made in a report by the Comptroller General to the head of an agency.	31 U.S.C. 720(b)	Within 60 days after date of report	GO
Federal government pension plans	31 U.S.C. 9503(a)(1)(B)	Annually	
Actions taken to increase competition for contracts; number and dollar value of noncompetitive contracts and accomplishments of the advocate for competition.	41 U.S.C. 419	By January 31, 1986, 1987, 1988, 1989, and 1990.	

LIST OF REPORTS WHICH IT IS THE DUTY OF ANY OFFICER OR DEPARTMENT TO MAKE TO CONGRESS

PART V.—REPORTS BY EACH EXECUTIVE OFFICE AND CABINET-LEVEL DEPARTMENT—Continued

Nature of report	Authority	When expected to be made	Committees
Note.—The appropriations made for printing and binding shall not be used for any annual report or the accompanying documents unless the manuscript and proof therefor is furnished to the Public Printer in the following manner: Manuscript of the documents accompanying such annual reports on or before the 1st day of February of each year; manuscript of the annual reports on or before the 15th day of February of each year; complete revised proofs of the accompanying documents on the 1st day of March of each year and of the annual reports on the 10th day of March of each year; and all of said annual reports and accompanying documents shall be printed, made public, and available for distribution not later than within the first 5 days after the assembling of each regular session of Congress. The provisions of the section shall not apply to the annual reports of the Smithsonian Institution, the Commissioner of Patents and Trademarks, the Comptroller of the Currency, and the Secretary of the Treasury.	44 U.S.C. 1111	(Printer's deadlines for submitting certain annual reports).	
Response to OMB review of agency information management activities	44 U.S.C. 3518(c) (94 Stat. 2822)	Within 60 days of receipt of OMB report.	GO, AP, AC
Results of investigations of allegations of the violation of any law, rule, or regulation, or mismanagement gross waste of funds, abuse of authority, or substantial and specific danger to the public health or safety.	5 U.S.C. 1206(b)(5)(A) (92 Stat. 1125)	In each case	
Except when a different time is expressly prescribed by law, the various annual reports required to be submitted to Congress by the executive and military departments shall be made at the commencement of each regular session.	5 U.S.C. 2952	Annually, beginning of the session	
Estimates of the additional personnel and expenditures for personnel services and for all other objects to be required by the first 5 years of any function, activity, or authority which may be created or expanded as a result of legislative proposals entailing an annual expenditure of appropriated funds in excess of $1 million.	5 U.S.C. 2953	Required, when pertinent, in all reports to Congress.	
Professional and scientific positions established under 5 U.S.C. 3104 and 5 U.S.C. 5371	5 U.S.C. 3104(b)	Annually, by December 31	
Positions in grades GS-16, 17 and 18	5 U.S.C. 5114(a)	Annually, by February 1	
Activities under the Freedom of Information Act	5 U.S.C. 552(d)	Annually, by March 1	
Notice of any proposal for new or altered Federal records systems	5 U.S.C. 552a(o)	In advance	
Compliance with the laws relating to open meetings of agencies of the Government (Government in the Sunshine Act).	5 U.S.C. 552b(j)	Annually	

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Addendum: Question from Chairman Biden

At the Judiciary Committee's March 5, 1987 hearing on oversight and authorization for the Department of Justice, Chairman Biden asked the Attorney General if the Department would support legislation to repeal the McCarran-Ferguson Act antitrust exemption for the business of insurance. The Attorney General responded that he wanted to consult with Acting Assistant Attorney General Charles F. Rule before providing a formal response.

As indicated in the statement that Mr. Rule submitted on behalf of the Department to the Senate Subcommittee on Antitrust, Monopoly and Business Rights during its recent hearings on S. 80, the Department of Justice endorses the Congress' inquiry into the continuing need for the McCarran-Ferguson exemption, at least in its present form. We are, however, opposed to any movement or appearance of movement toward the federalization of insurance regulation or to any legislation that would adversely affect the ability of the states to regulate insurance. Finally, we believe that there are some uncertainties associated with both the costs and benefits of repealing or modifying this longstanding exemption that warrant careful attention. A copy of Mr. Rule's statement is attached.

Department of Justice

STATEMENT OF

CHARLES F. RULE
ACTING ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

A BILL TO REPEAL THE MCCARRAN-FERGUSON ACT

ON

FEBRUARY 18, 1987

Mr. Chairman and Members of the Committee:

I am pleased to appear this morning to discuss the proposed repeal of the exemption from the antitrust laws that is contained in the McCarran-Ferguson Act. The antitrust laws embody our fundamental national policy of free market competition. In the absence of compelling circumstances, the Department is opposed to the enactment or continuation of either general or industry-specific exemptions from those laws. It is certainly appropriate to reexamine such exemptions from time to time to determine whether their justifications remain valid, discern the competitive costs they may be imposing on society, and consider any costs that might attend their repeal. We endorse the Committee's decision to undertake at this time such a reexamination of the antitrust exemption currently enjoyed by the business of insurance. We believe the burden of persuasion should be on those who advocate the perpetuation of antitrust immunity.

I would note at the outset that we are discussing the repeal of a long standing, industry-specific antitrust exemption rather than the enactment of a new one. As I will discuss in detail in a moment, we feel that there would be no justification today for the enactment of a new antitrust exemption for the business of insurance. There are, however, possible costs associated with repealing the one we have--costs that it may well be necessary or appropriate to bear, but costs nonetheless. The possibility of having to incur such costs when an antitrust exemption finally is repealed is one very good reason not to create questionable exemptions in the first place.

Prior to 1944, regulation of insurance was exclusively the province of the states, under the prevailing view that insurance was not "commerce." In that year the Supreme Court decided the South-Eastern Underwriters case 1/ and held that the insurance business was within the regulatory power of Congress under the commerce clause and thus was subject to the antitrust laws. South-Eastern Underwriters was perceived as posing three threats to state insurance regulation. First, it was feared that the commerce clause would unduly limit the power of the states to regulate and tax on the theory that regulation and taxation of insurers engaged in interstate commerce imposed an impermissible burden on that commerce. Second, there was apprehension that state regulation of insurance rates would be held invalid because of its inconsistency with the Sherman Act. Finally, there was a concern that efficiency-enhancing joint insurer activities would be invalidated under the antitrust laws.

Congress enacted the McCarran-Ferguson Act to remove these perceived threats. Section 1 of the Act declares that

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1/ United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

regulation and taxation of the business of insurance by the states is in the public interest and that silence on Congress's part shall not be construed to impose any barrier to such state regulation or taxation. Section 2(a) provides that the business of insurance and those engaged therein shall be subject to state laws relating to the regulation and taxation of insurance. Section 2(b) reinforces that statement by declaring that no congressional enactment shall be construed to "invalidate, impair, or supersede" any state law enacted for the purpose of regulating or taxing the business of insurance unless that congressional enactment specifically relates to the business of insurance. Finally, sections 2(b) and 3(b) of the Act declare that, except for agreements to boycott, coerce or intimidate or acts of boycott, coercion or intimidation which remain fully subject to the Sherman Act, the "business of insurance," to the extent it is regulated by the states, is exempt from the antitrust laws.

S. 80 would repeal the McCarran-Ferguson Act in its entirety. It would repeal the Act's explicit antitrust exemption provisions. It also would eliminate those sections of the Act that confirm the ability of the states to regulate and tax the business of insurance and that govern the construction of other federal laws that do not specifically relate to the business of insurance.

We are not certain whether S. 80 was drafted with the intention of doing anything more than repealing the antitrust exemption currently enjoyed by the business of insurance to the extent that business is regulated by state law. On the basis of Senator Metzenbaum's statement on the occasion of the bill's introduction, it does not appear that S. 80 is intended to deny states the ability to regulate the insurance industry. Nor does S. 80 appear designed to herald any new federal regulation other than the full applicability of the federal antitrust laws to the business of insurance, just as they apply to other businesses.

I will turn to the merits of repealing insurance's antitrust exemption in a moment. Initially, I want to express concern that by repealing the McCarran-Ferguson Act in its entirety S. 80 could have unintended effects on state regulation of insurance. While states appropriately are examining the way in which they regulate the business of insurance, and moving toward less regulatory regimes that recognize the benefits of competition, the authority to regulate should remain at the state level. The Department would be very much opposed to any movement, or appearance of movement, toward the federalization of insurance regulation. Repeal of anything other than the explicit antitrust exemption in the McCarran-Ferguson Act could create confusion and litigation concerning state insurance regulation and taxation and the supremacy and so-called dormant commerce clauses of the Constitution.

Turning to antitrust issues, the Department has always been and remains opposed to general or industry-specific antitrust exemptions in the absence of a strong showing by those who advocate immunity of an actual or potential conflict between the antitrust laws and some supervening societal goal. The antitrust laws embody the nation's fundamental economic policy of competition. Competition maximizes consumer welfare and the efficient allocation of societal resources.

At least in recent years, the antitrust enforcement agencies and the courts have interpreted the antitrust laws in ways that do not inhibit any practice that is not truly anticompetitive. Such recent Supreme Court decisions as General Dynamics, 2/ GTE Sylvania, 3/ and Broadcast Music 4/ make clear that sound economically-based analysis is required before an antitrust challenge will be sustained. In those and other decisions the courts have exhibited a reluctance against over-zealous application of the per se rule to alleged restraints of trade the actual competitive effects of which are ambiguous. While Congress in recent years has recognized the need for certain clarifications of the antitrust laws and for

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2/ United States v. General Dynamics Corp., 415 U.S. 486 (1974).

3/ Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

4/ Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979).

moderation of their penalties, 5/ the inherent flexibility of those laws and the importance of the competitive process they protect argue strongly against antitrust exemptions that are not clearly and convincingly justified.

Were an antitrust exemption for the business of insurance a matter of first impression today, such an exemption could not, we believe, be justified. First, there is no inherent need for a special statutory antitrust exemption in order for the states to regulate the business of insurance, or for that matter any other business. Under the "state action doctrine," which was undeveloped in 1945 but has been the subject of many subsequent Supreme Court decisions, a state effectively may immunize what otherwise might be an unlawful restraint of trade through a clearly articulated, affirmatively expressed state policy to displace competition, coupled with active supervision of any private conduct that may be involved.

Second, the application of the antitrust laws to potentially efficiency-enhancing joint activities among competitors has become much more predictable--and much more favorable to such activities--than it was at the time the McCarran-Ferguson Act was enacted. Some forms of joint activity that might have been condemned under overly-broad interpretations of the antitrust laws are now clearly

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5/ See, e.g., the Export Trading Company Act of 1982, the National Cooperative Research Act of 1984, and the Local Government Antitrust Act of 1984.

permissible. Antitrust rules, as the courts articulate them today, are firmly based upon principles of sound economics and can be adapted to any industry. It is possible, as I will discuss in a moment, that some legitimate joint insurer conduct might superficially be perceived as raising antitrust risks in the absence of statutory immunity, and thus that some clarification of the antitrust laws might be appropriate if the current McCarran-Ferguson exemption were repealed. Such a clarification, however, would be a far cry from exempting any truly anticompetitive conduct from the application of those laws.

While we therefore think that the record would be lacking for the creation today of a new exemption for the business of insurance like that contained in the McCarran-Ferguson Act, the fact of the matter is that such an exemption has been on the books for 40 years, and the system of state regulation that it complements has been around even longer. Thus, repealing the exemption involves more than just cleaning up Title 15 by removing any antitrust exemptions that we would not enact today. Relevant inquiries include whether there would be any significant costs associated with repealing insurance's antitrust exemption, and if so whether those costs would be more than outweighed by the benefits of doing so. We perceive some uncertainties associated with both of these issues that we believe warrant the Committee's attention.

Turning first to possible costs of repeal, some uncertainty exists as to whether repealing insurance's antitrust exemption might indirectly and adversely affect the manner in which states choose to regulate insurance. Such an effect might be the result of a perception that the state action doctrine, even as understood today, would not immunize some joint insurer conduct under some forms of state regulation, particularly state regulation that is neutral as to whether insurers participate in joint activity or not.

As I indicated above, there are two tests that must be met for state action immunity to be afforded to an alleged restraint on competition. First, the restraint must be the product of a "clearly articulated and affirmatively expressed" state policy to displace competition. Second, the state must actively supervise any private anticompetitive conduct. 6/ In its 1985 decision in Southern Motor Carriers, 7/ the Supreme Court held that a state need not "compel" private anticompetitive conduct in order for such conduct to be immune from antitrust liability as state action. In that case, state regulation of collective ratemaking by intrastate motor carriers was considered sufficient to establish the state

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6/ California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980), quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of Brennan, J.).

7/ Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).

action immunity. While Southern Motor Carriers suggests that under the state action doctrine at least some forms of state insurance regulation would protect concerted decisions among insurers from antitrust liability, states may regulate some insurer conduct in a manner that is sufficient to trigger the McCarran-Ferguson exemption, but not sufficient to provide state action immunity. Whether any particular, overall state regulatory scheme would satisfy the two-pronged test for state action immunity described above ("clear articulation," "active supervision") could be open to question.

The appropriate response to this uncertainty, of course, may be that the requirements for state action immunity under Southern Motor Carriers are the very tests that should apply to state insurance regulation, just as they apply to any other industry. One can well argue that any alleged competitive restraint among insurers that is sufficiently "private" in nature to be unprotected by the state action doctrine should be subject to antitrust scrutiny. There is a possible problem here, however. It is conceivable that if the McCarran-Ferguson antitrust exemption were repealed, at least some states might react by adopting less innovative, more anticompetitive approaches to insurance regulation in order to ensure the applicability of the state action doctrine. That is, some current state regulation may be perceived as too permissive to trigger the state action defense--i.e., not a sufficiently clear expression of a policy to displace competition--and thus might be replaced by a more anticompetitive regulatory scheme in order to guarantee antitrust immunity. As Senator Metzenbaum noted in introducing S. 80, the recent trend in state regulation has been to permit freer competition among insurers. We would hope that that trend would not be adversely affected by a change in federal law that induces attempts to fortify state regulation in order to preserve antitrust immunity.

Some uncertainty also may exist with respect to the bounds of legitimate joint insurer activities related to prices. While it is true that antitrust law has evolved in recent years to avoid per se condemnation of joint activities that are on balance procompetitive--even in the face of spurious arguments that they constitute price fixing 8/--some collective activities that promote competition among insurers might be unduly deterred by perceived antitrust risk. Many desirable joint activities protected by the McCarran-Ferguson Act today are at least indirectly related to price, and might be subjected to antitrust challenges if insurance's antitrust exemption were simply repealed. While I believe those practices ultimately would be vindicated as in the interests of consumers, that vindication might take time and engender some significant costs.

8/ See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., supra note 4.

This uncertainty might be reduced by a repeal of the McCarran-Ferguson Act antitrust exemption that also clarifies those legitimate cooperative activities that would not be unlawful under the antitrust laws. This is the approach, for example, of Senator Simon's proposal, introduced in the last Congress as S. 2458, and similar in concept to a proposal considered by the National Commission for the Review of Antitrust Laws and Procedures in 1979. It would preserve an exemption for certain specified joint insurer activities--for example, collecting and disseminating loss data, preparing pure premium rate data and policy forms, and conducting various other forms of research and information distribution.

There are, of course, potential difficulties with this approach. It may be difficult to describe in sufficient detail those cooperative arrangements that are legal under the antitrust laws. Too broad a description could protect anticompetitive conduct, while too narrow a description could be inadequate to eliminate the uncertainty. It also might be difficult to develop an exhaustive list of legitimate arrangements.

Antitrust uncertainty might be further reduced by phasing in application of the antitrust laws to the business of insurance, along the conceptual lines of sections 1(b) and 2 of S. 80. While such provisions could provide an appropriate adjustment period, it is not clear whether outstanding legal issues would be decided or even justiciable until after such a phase-in was complete.

There are also uncertainties associated with the potential benefits--essentially the promotion of competition--that would be derived from repealing insurance's antitrust exemption. Repealing that exemption may not make insurance significantly more widely available at lower prices. In particular, repeal does not seem likely to solve the crisis in certain lines of property/casualty insurance. We have not seen any direct evidence that anticompetitive collusion has produced this crisis, and the circumstantial evidence suggests that collusion is not the cause.

The structure of the property/casualty insurance industry is conducive to competition, not collusion. Moreover, as Senator Metzenbaum noted when introducing S. 80, state rate regulation that may have facilitated collusion by requiring prior approval of rates and discouraging deviations from the rates established by rating organizations has largely been supplanted by state laws that allow free play for price competition.

The United States property/casualty insurance industry includes a very large number of underwriters--in the neighborhood of 1,000. 9/ No single firm or small group of firms dominates this industry: the eight largest property/casualty companies collectively account for only about a third of direct premiums written by property/casualty

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9/ Best's Executive Data Service A2-99-99 (1986).

underwriters. Property/casualty underwriters are diverse in their methods of doing business: for example, some sell through agents, while others are "direct writers" who deal with insurance consumers through their own employees. While not all companies do business in all states and most companies do not write all types of property/casualty coverage, we are not aware of any significant regulatory or other barriers that would prevent companies from moving quickly from one type of property/casualty insurance to another or from one state to another.

In these circumstances we would not expect to find effective collusion. Even if a substantial number of firms in a particular state could reach accord as to price by agreeing to adhere to the pricing schedule filed by a rating organization, it would be difficult for those firms to prevent outsiders from rapidly entering the market and offering a lower price to insurance consumers. Moreover, while defections from the collusive agreement would be easy to detect because of state laws requiring the filing of all rates, there is no readily apparent means of preventing those defections, at least in the large number of states that permit new rates to be used as soon as filed or even prior to filing.

Hence it seems highly probable that the property/casualty industry is in fact competitive, and that collusion is not responsible for the availability and affordability crisis in certain lines of insurance. While the cause of the crisis is not entirely clear, it seems likely that the increase in the level of casualty loss payouts and expenses in these lines, and the increase in the variability of those losses and expenses, are major contributing factors to the crisis. If variability (that is, "risk") is very substantial, the premiums required to maintain solvency requirements might be so high that coverage would be unattractive to potential insureds. There would then appear to be an affordability crisis in the affected lines. Should variability be so great as to exceed the ability or willingness of insurers to cope with it, coverage might be unavailable at any price.

To summarize, Mr. Chairman, the Department of Justice remains opposed to the enactment of new antitrust exemptions or the continuation of those that may be outdated and unnecessary without a strong showing by the advocates of immunity that they are justified. We believe that the current, broad McCarran-Ferguson exemption for the business of insurance may well have outlived its usefulness, and endorse the Committee's inquiry into the continuing need for it, at least in its present form. We believe, however, that there are some uncertainties associated with both the costs and benefits of repealing or modifying this longstanding exemption that warrant the Committee's inquiry and attention. We will be most interested in the record that evolves before the Committee, and we hope to work further with the Committee in assessing what kind of legislation would be best at this time.

Mr. Chairman, that concludes my prepared remarks. I would be happy to answer any questions you or any members of the Committee may have.

U.S. Department of Justice

Washington, D.C. 20530

October 16, 1985

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

This letter responds to your request to the Attorney General for the comments of the Department of Justice on your draft report to the Chairman of the Senate Committee on Governmental Affairs entitled "An Assessment of the Need for a Statutory Inspector General at the Department of Justice." The report recommends that the Congress consider amending the Inspector General Act of 1978 to establish a statutory Office of Inspector General (IG) in the Department by a blanket extension of the 1978 Act, or by establishing a hybrid IG organization and tailoring any legislation creating an IG to accommodate the Department's mission and responsibilities.

As the General Accounting Office (GAO) is aware, ever since the passage of the Inspector General Act of 1978, representatives of the Department have appeared on several occasions before committees of the Congress -- in both the House and the Senate -- to discuss Justice's serious concerns about the extension of the 1978 Act to the Department in any form. Our analysis of the report discloses that the previously expressed concerns of the Department have not been fully addressed. GAO has recognized several of the significant concerns raised by the Department, but has commented on them without making any substantive assessments of their impact on the Department's mission and responsibilities. Without such assessments, there is no demonstrable basis for the Department to consider adoption of the conclusions and recommendations set forth in the report. It appears that the report was designed and presented as a policy statement in favor of an IG, rather than as an audit report presenting facts that support the need for such a major functional realignment.

As for the Department's audit function, any belief that the Departmental Audit Staff is without mandate or authority is unfounded. The Audit Staff has the authority it needs to effectively conduct and coordinate audit efforts within the

Department. 28 C.F.R. 0.75(h) states that the Assistant Attorney General for Administration (AAG/A) is responsible for formulating Departmentwide audit policies, standards, and procedures, and for directing internal audits of all organizations, programs and functions of the Department, and audits of expenditures made under the Department's contracts and grants. DOJ Order 2900.1C charges the Audit Staff with the execution of these responsibilities under the direction of the AAG/A. A broader mandate in the area of audit would be difficult to conceive.

The assertion that the Audit Staff lacks the power or influence within the Department necessary to coordinate its audit activities with other organizations can be refuted by its Departmentwide jurisdiction; by its complete independence in selecting organizations, programs, and functions to be audited and in establishing the scope of such audits; and by its authority to establish and maintain the Department's audit resolution and follow-up tracking system on audit reports until final resolution. The Audit Staff's influence is also demonstrated by the Attorney General's Order (DOJ Order 2900.5) which establishes responsibilities for the detection of fraud or mismanagement on the part of Department officials or employees, and by the fact that results of certain Audit Staff reports go directly to the Deputy Attorney General or to the Attorney General.

GAO also questions the organizational independence of the Audit Staff. Although the Audit Staff ordinarily reports to the AAG/A in charge of the Justice Management Division (JMD), it does not do so with respect to audits of programs and activities of JMD. DOJ Order 2900.1C states that the results of audits of the JMD will be reported to the Attorney General. Also, as stated above, the Audit Staff can select the subjects of its audits, conduct those audits as it sees fit, and make such reports and recommendations as it deems appropriate.

Turning to GAO's comments on the Department's internal investigative units, we see a serious misunderstanding by GAO of the investigative reporting structure in the Department. In the text and its accompanying illustrations, GAO repeatedly represents that the internal investigative units are not, or do not appear to be, independent because of the levels of review that their investigative results supposedly go through before they reach the Attorney General. The problem is that GAO failed to indicate that there is a dual reporting structure in place: all misconduct matters are reported to the Office of Professional Responsibility (OPR) and to the head of the component in which the unit is located. Each investigator in each unit, and every internal investigative unit head, is very much aware that normal reporting can be ignored by coming directly to OPR if there is ever a question about the propriety of reporting any aspect of any misconduct matter to a departmental official. (Moreover, nowhere in its report does GAO refer to the Attorney General's February 16, 1982 memorandum to all employees advising them of their affirmative obligation to notify OPR promptly of allegations of misconduct on the part of Justice Department employees.)

Further in this regard, it has historically been the case, largely due to every Attorney General's strong support, that the internal investigative units look to OPR as the Attorney General's umbrella component in the Department where all substantive reports can and should be directed, where certain determinations about the course of an investigation can be made, where liaison with the Criminal Division and other investigative entities can be effected, where investigative assistance and advice can be obtained, and where requests for such things as additional funds and other resources can be endorsed and facilitated. Contrary to what GAO asserts, the Attorney General's Office of Professional Responsibility has always served, and continues to act, as the one place in the Department of Justice where any internal investigative unit, any audit unit, or any employee can come for direct, timely, and unfettered access to the Attorney General on matters appropriate for his review.

We acknowledge that "authority," "independence,", "coordination," and "follow-up" are critical elements in an effective audit and investigative operation. However, these elements are being carried out effectively in the Department, and GAO's IG proposal would do little to enhance our audit and investigative capabilities. This is not to say that our audit and investigative activities should not be subject to scrutiny. These activities need to be and will be subjected to periodic evaluation to be sure that they remain effective and meet specific and changing management needs. Should any of the critical elements need strengthening, the mechanisms for strengthening them -- via the issuance of new or revised operational directives, etc. -- already exist and do not require legislative authority.

In terms of the legal implications of GAO's recommendation, we continue to believe that a blanket extension of the Inspector General Act of 1978 or tailoring of the legislation in any form would not be a prudent decision. Such a reorganization would disrupt the core functions of the Department and undermine the accountability of its officials for the Department's activities.

The primary issue is that Justice's operations concentrate on law enforcement activities rather than on the monitoring of contracts, grants, and other activities related to the disbursement of federal funds. The functions of the Department to investigate, to prosecute, and to institute, litigate, and settle law suits, require that broad-based discretion be entrusted to the Attorney General. He must have clear authority and he must be accountable. Any infringement upon the Attorney General's role as the chief law enforcement officer of the Nation will directly undermine his authority and accountability.

The Department's opposition to establishment of an IG function involves three major legal concerns:

1. The Inclusion of the Department of Justice Under the IG Act Would Superimpose an IG Over the Present Authority of the Attorney General

   The Nation's chief law enforcement officer is the Attorney General. Within the Office of the Attorney General is the final and ultimate repository of prosecutorial power. The power of investigation, indictment and prosecution is of far greater breadth than any IG. These responsibilities -- to investigate, to prosecute, or to institute litigation, when such is necessary to uphold federal law -- require that broad-based discretion be entrusted to the Attorney General.

   A diffusion of this responsibility would result by the extension of the 1978 IG Act to the Department. For example, under the 1978 Act, the role of the IG includes providing policy direction in an agency for investigations and conducting investigations he determines appropriate. The head of an agency may not preclude or interfere with an investigation of an IG. This wide authority of present statutory IGs would impact adversely upon the government's law enforcement efforts if such power was to be lodged in a Justice IG. It would conflict with the very responsibility committed to the Attorney General under present law. This distinction has been recognized by the Congress. At the time it created IGs for other agencies, the Congress declared that it would be "undesirable to impose an Inspector General, who is basically a law enforcement official, on law enforcement agencies." S. Rep. No. 1071, 95th Congress, 2nd Sess. at 14(1978).

2. The Inclusion of the Department of Justice Under the IG Act Would Allow an Independent IG to Interfere with or Jeopardize Ongoing External Investigations and Prosecutions

   With respect to prosecutorial decisions, the establishment of an IG would engraft a new review process on existing procedures that is unnecessary and would diminish the flexibility and candor necessary to the proper exercise of prosecutorial discretion. In addition to the general conflict between review of prosecutorial decisions by an IG and the principle of the independent exercise of prosecutorial discretion, there are certain instances in which the general prohibitions in the IG Act on interference with investigations and the issuance of subpoenas by the IGs would directly conflict with existing review procedures in the Department. Also, it appears that as a general matter, the Attorney General would be powerless to direct the IG to postpone or delay an investigation that the Attorney General determined could jeopardize an ongoing investigation or prosecution.

3. The Inclusion of the Department of Justice Under the IG Act Would Require the IG to Disclose Sensitive or Classified Information

The Department's concerns over the blanket extension of the IG Act include the reporting requirements under the Act. The Act requires a semi-annual report summarizing the activities of each IG during the immediate preceding 6-month period. It is further required that within 60 days of the transmission of the above-described report to the Congress, the head of each establishment should make copies of such reports available to the public upon request. The report which would be required both to Congress and the public does not address the need to protect from disclosure ongoing investigations and techniques, sensitive confidential sources, classified information, litigation material and other similar sensitive information contained in Department files. Unlike other agencies, these activities are the major functions of the Department of Justice. The only way to protect such information is to limit those who have access to it and to ensure that the agency holding the information has control over its use and dissemination. If such information were contained in the reports required of the IG, the risk of compromise is greatly increased because of the number of people who would necessarily have access to the reports, even if the reports were not required to be released to the public.

In conclusion, aside from the real legal concerns articulated above, the Department has always held that the functions of the Office of Professional Responsibility and the Audit Staff are being carried out efficiently and effectively without the creation of a statutory Office of Inspector General and without blurring the clear authority of the Attorney General to both carry out the Nation's law enforcement role and oversee enforcement action necessitated by the audit and internal investigative functions.

We appreciate the opportunity to respond to your report while in draft form.

Sincerely,

W. Lawrence Wallace

W. Lawrence Wallace
Assistant Attorney General
for Administration

QUESTION FROM SENATOR BIDEN

Question:

Between various agencies, bureaus and departments, your 1988 budget requests $190,000 for Official Reception and Representation expenses. Can you provide for the Committee a listing of how these funds were used for the past three years?

Answer:

For 1988, the Department of Justice is requesting an allocation of $190,000 for Reception and Representation expenses. Of this amount, $75,000 is requested within the appropriation's general provisions, $70,000 is requested specifically for the Federal Bureau of Investigation, and $45,000 is requested for the Drug Enforcement Administration.

In 1985, 1986 and 1987, $75,000 was authorized within the general provisions and $45,000 was authorized for the FBI.

In the past, there have been several noteworthy uses of the Department's reception and representation allocation authority. The funds have covered the expenses of employees whose official positions entail responsibilities for establishing and maintaining relationships of value to the United States Government. Such funds have been used to extend courtesies to representatives of foreign countries, State and local governments, and to fund official activities that further the interest of the United States Government.

In 1986, for example, delegations from Italy, Japan, Canada, the Cayman Islands, Mexico, Switzerland, Burma, Germany, and Australia were hosted at luncheons and dinners. Law enforcement groups including the Mexican-American Conference on Drug Enforcement and the Economic Crime Council, Members of Congress, the Judiciary, and representatives of the press and public were guests at most of these events.

Finally, this funding was available for the purchase of gifts and momentos to be given when protocol so dictates. For example, gifts are frequently given to officials from foreign governments when they visit this country or when our officials visit theirs. The value of individual gifts range from $1.50 to $116.00 and are purchased and held in inventory for distribution.

Specifically, during the past fiscal years, funds were used as follows:

	1985 Actual	1986 Actual	1987 Proposed[1]
Attorney General[2]	$44,500	$41,000	
Immigration and Naturalization Service	4,893	3,264	
Drug Enforcement Administration	24,000	26,000	
Bureau of Prisons	852	970	
U.S. Marshals Service	0	2,000	
Total, General Provisions	$74,245	$73,234	$75,000
Federal Bureau of Investigation	45,000	45,000	45,000
Total	$119,245	$118,234	$120,000

Question:

The Department has had consistent problems updating its information systems. Does Justice finally have a plan for a long term information systems management? Have you submitted this plan to OMB for review?

Answer:

The Department of Justice published a Strategic Plan for Automated Information Systems (AIS) dated September 1986. This plan conveys senior management policy to the offices, boards, divisions, and bureaus. Specifically, the plan provides the management and technical context within which organization-specific AIS plans must be developed. The purpose of this plan is to improve and enhance the management and utilization of AIS resources, throughout the Department of Justice, based on a Departmental rather than any single organization's perspective.

This AIS plan was issued under the aegis of the Department's Information Resources Management (IRM) Program, and represents a major aspect of IRM. AIS expenditures now represent over 10% of the Departmental budget. Thus, AIS requires special management consideration, particularly in light of increasing reliance throughout the Department on information technology to provide and process information essential to its mission.

The Department's Strategic Plan for AIS will be updated annually and will identify continuing and new initiatives mandated by the Attorney

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[1] Direct spending authority has not yet been distributed for 1987.

[2] Funds controlled by the Attorney General are distributed on an individual request basis to all DOJ components.

General. As such, the plan is the primary management policy direction to Departmental organizations in the formulation of their respective AIS plans. It is to be used in conjunction with the AIS policies order (DOJ 2830.1D), associated guidelines, and the AIS planning methodology. The methodology provides a logical, systematic approach for both strategic and tactical planning. The thrust of the methodology is to document programmatic areas to determine how AIS can support the organization's mission and program responsibilities.

Criteria on which future organization-specific AIS plans will be evaluated and related AIS preacquisition requests approved will include the degree to which organizations address and demonstrate compliance with the Departmental AIS objectives and initiatives.

In general, the AIS plans of the DOJ components provide the functional goals of the organizations and the specific initiatives/projects for implementing the policy guidance outlined in the Department's long-range AIS plan. Where guidance dictates the involvement of more than one component working together, such as in the Uniform Office Automation and Case Management Project, implementing initiatives are identified as part of the Departmentwide plan.

The Department Strategic Plan for Automated Information Systems was signed by the Attorney General and the plan was forwarded to the Deputy Director, Office of Management and Budget.

QUESTION FROM SENATOR BIDEN

Question:

The Department is requesting an increase of $50 million for litigation resources for various divisions based on, for the most part, case load information in the budget document. GAO and OMB have noted that poor record keeping has resulted in double and triple counting of cases, thereby overstating Justice's workload. What specific steps have been taken to correct these problems?

Answer:

A successful Case Management System prototype has been tested and based on the results of the prototype, a Case Management System has been designed and developed. The Department is in the process of implementing the Case Management System based on the standard definitions approved by the six litigating components and the Executive Office for United States Attorneys. This new Departmental system will have the capability to provide an accurate aggregate case count, since it will be based on monthly access to data for all litigating components.

Question:

Your fiscal 1988 budget request seeks $24.7 million for automation of legal activities. Can you explain to us how this would be used in conjunction with previous funds for automation provided the U.S. Attorneys and other divisions under the heading of General Legal Activities?

Answer:

The Department is committed to moving towards compatibility and interoperability in the office automation area and will be utilizing the Legal Activities Office Automation funding in support of systems (hardware and software) acquisitions and related services and support. All of the $24.7 million requested in Fiscal Year 1988, will go to support the acquisition of terminals and related systems support (site preparation, installation, hardware, software, training, maintenance, and technical assistance), principally for the joint "EAGLE" procurement for the Tax and Criminal Divisions and the U.S. Attorneys. Previous funding for office automation, enacted in the 1987 appropriations act, enabled the Department to begin installation of the AMICUS system in the Land and Natural Resources and Civil Rights Divisions, and allowed for the acquisition of equipment to support interim needs of the Criminal and Tax Divisions and the U.S. Attorneys prior to the contract award for the EAGLE procurement later this year.

Question from Senator Biden

THE JUSTICE DEPARTMENT'S PROPOSED AUTHORIZATION BILL FOR FY 1988 REQUIRES VERY LITTLE IN THE WAY OF REPORTING REQUIREMENTS FOR UNDERCOVER OPERATIONS. IF CONGRESS GRANTED THE DEPARTMENT PERMANENT UNDERCOVER AUTHORITY, WOULD YOU SUPPORT ADDITIONAL OVERSIGHT REPORTING REQUIREMENTS.

The Department does not object to oversight reporting requirements that would be appropriate if the Department were operating under a permanent undercover authorization.

Any reporting requirements with respect to undercover activities must, of course, take into account the security and prosecutive interests that must be served. Reporting on these activities must normally await the completion of all aspects of the investigation and prosecution. These concerns have been respected in prior reporting requirements imposed by Congress. Other than these security concerns, the Department's principal concern is that we be afforded sufficient opportunity to work with the Committee to ensure that any reporting requirements make appropriate and efficient use of the information that the Department generates internally regarding these operations and that the information provided to Congress is concise, valuable and as timely as possible.

QUESTION FROM SENATOR BIDEN

BOTH THE FBI AND THE MARSHALS SERVICE HAVE RESPONSIBILITY FOR FEDERAL EFFORTS TO APPREHEND FUGITIVES. THERE HAS BEEN DISCUSSIONS AND STUDIES WHETHER THE PROGRAM SHOULD BE TRANSFERRED TO THE MARSHALS SERVICE OR TO THE FBI. HAS THE DEPARTMENT REACHED A FORMAL POSITION ABOUT THE DISTRIBUTION OF THIS RESPONSIBILITY?

According to a memorandum signed by then Deputy Attorney General Civiletti on October 1, 1979, the United States Marshals Service has responsibility for apprehending all fugitive parole and probation violators; escaped prisoners; and those who have failed to appear, except when the failure to appear occurs prior to conviction in a case that was investigated by the FBI. The FBI has responsibility for all other fugitive apprehensions.

That memorandum is under review, but no decision has yet been made to change this distribution of authority. The FBI and the United States Marshals Service, however, have agreed to certain changes on an interim basis. For example, they have agreed that the Marshals Service's Warrant Apprehension Narcotics Teams (WANT) will target 365 Organized Crime Drug Task Force fugitives. Procedures have been agreed upon to insure that this program will not jeopardize any on-going drug investigations.

A formal decision as to any changes in current responsibility will be made after review of this program and other pertinent information.

QUESTION FROM SENATOR KENNEDY

Question:

In the drug enforcement bill, which Congress passed and the President signed last year, Congress authorized $230 million each year for 1987, 1988, and 1989 to assist State and local governments in combatting drug crimes.

That money has just begun to flow to the States, and the Administration has decided to ask for no money for drug enforcement grants for 1988.

Was the Administration's decision not to seek funds in 1988 based on a cost/benefit analysis of the effectiveness of the State and local drug enforcement programs funded with the 1987 appropriation?

Answer:

No, the decision was not based on a cost/benefit analysis of the effectiveness of the State and local drug enforcement programs funded in 1987.

Question:

If you decided not to fund these grants without giving any consideration to the effectiveness of State and local programs, notwithstanding the fact that Congress voted overwhelmingly to authorize these grants for at least three years, and the President signed that authorization, what factors did you consider in arriving at your decision?

Answer:

The decision was based on priorities in allocating resources. Available resources must first be utilized to address Federal law enforcement responsibilities. The Federal Government's role with respect to State and local grants should be encouraging the development of, rather than sustaining, locally based programs to deal with drug abuse.

Question from Senator Kennedy

If the Administration supports the broad prohibition of discrimination in education institutions by those who receive federal funds, why don't you support the broad prohibition of discrimination by those who get federal money in all other areas, such as transportation, health care, social services, and others?

Answer: The entire impetus behind this legislation is to respond to the Grove City decision. The Administration-supported measure fully and adequately addresses the demonstrated concerns that have been expressed as a result of that decision. If there are issues, unrelated to Grove City legislation, which need attention in the civil rights field, they can be addressed separately by tailored legislation which addresses specific problems.

Question from Senator Kennedy

On the same day the Grove City case was decided, the Supreme Court decided Consolidated Rail v. Darrone, in which it applied the Grove City principle to narrow Section 504 in all its applications. Section 504 is the only disability discrimination statute, and covers all activities receiving federal assistance, including employment. Why do you support a bill that would fail to protect disabled citizens across the board, except in education?

Answer. The Administration-supported measure is aimed at addressing concerns that arose in light of the Grove City decision, which has been applied to Section 504. That measure responsibly addresses those concerns. If there are other areas where there is a demonstrated need to act, we are prepared to examine those areas and consider appropriate legislation.

Question from Senator Kennedy

Regarding the new position "Special Counsel for Immigration-Related Unfair Employment Practices" created by the new immigration reform bill:

-- When can the Judiciary Committee expect to receive from the President for the Senate's advice and consent his nominee for this new Special Counsel position?

Answer. We expect that the President will send a nominee for the Special Counsel position to the Senate for its advice and consent shortly.

Question from Senator Kennedy

Regarding the new position "Special Counsel for Immigration-Related Unfair Employment Practices" created by the new immigration reform bill:

-- In answer to inquires received regarding complaints of unfair immigration-related employment practices, what advice would you offer to persons whose rights may have been violated, put presently have no Special Counsel to whom to present a complaint?

Answer. First, if the charge is based upon national origin discrimination, and the employer has 15 or more employees for each working day in 20 or more calendar weeks, those complaints should be filed with the Equal Employment Opportunity Commission. Second, other charges under the jurisdiction of the new Special Counsel should be sent to the Civil Rights Division at the Department of Justice. The Civil Rights Division will hold those charges for referral to the Special Counsel when the Office of Special Counsel becomes operational.

Question from Senator Kennedy

Regarding the new position "Special Counsel for Immigration-Related Unfair Employment Practices" created by the new immigration reform bill:

-- Is there any time limitation on a private party's filing a complaint with the Special Counsel if the original charge is made within 180 days of the alleged unfair immigration-related employment action?

Answer. This question is unclear: If a party files a charge with the Special Counsel within 180 days of the alleged discriminatory act, it is timely filed.

Question from Senator Kennedy

Regarding the new position "Special Counsel for Immigration-Related Unfair Employment Practices" created by the new immigration reform bill:

-- Are there any time limitations on complaints filed by the Special Counsel if the complaint is based on a self-initiated investigation, rather than a charge filed by an aggrieved individual?

Answer. It appears that any self-initiated complaint by the Special Counsel must be filed before an Administrative Law Judge within 180 days of the alleged discriminatory practice. New Section 274B.(d)(1), which creates the Special Counsel's right, on his or her own initiative to conduct investigations, states that this provision is subject to paragraph (3) of this section. Section 274B.(d)(3), in turn, is entitled "Time Limitations on Complaints." It states, "No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel. . . ."

QUESTIONS FOR THE RECORD FROM SENATOR EDWARD KENNEDY TO ATTORNEY GENERAL MEESE REGARDING IMPLEMENTATION OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 AND OTHER IMMIGRATION MATTERS —

2. Currently, the status within the Department of Justice of the INS Commissioner is below that of the FBI AND DEA Directors and is only on a par with Assistant Attorneys General. Yet, INS comes second only to the FBI in enforcement responsibilities and personnel and is next year likely to be managing a budget approaching $1 billion. Is it not time for the INS Commissioner to be given status and rank appropriate to the agency he or she runs—perhaps on a par with the FBI Director? What is your view on the option of giving the INS Commissioner a term appointment, much like that of the FBI Director?

Provided below is a table of the most current spending authority estimates for the INS, FBI and DEA*.

	FY 87	FY 88
INS	$927,599,000	$1,057,273,000
FBI	$1,380,682,000	$1,580,876,000
DEA	$511,160,000	$543,047,000

*Includes pending supplemental budget requests for FY 1987 and projected reimbursements.

As a matter of information, the Director of the FBI is ranked at EL-II and the Administrator of the DEA is ranked at EL-III. It is our opinion that the Commissioner of the INS should be given a rank increase comparable to his status and the status of INS as a major enforcement entity within the DOJ. We will be proposing that the Commissioner be ranked at level III of the Executive Level Pay Schedule at the next convenient opportunity.

For the record, this issue (up grading the Commissioner, INS) was made a part of the initial "Immigration Reform and Control Act of 1983".

At the present time, we do not believe that the position of Commissioner, INS should carry the same type of "term appointment" as the Director of the FBI. Should, in the future, circumstances change the possibility of "term appointment" would be given appropriate consideration.

Questions for the record from Senator Kennedy to Attorney General Meese regarding implementation of the Immigration Reform and Control Act of 1986 and other immigration matters.

3. INS increasingly is involving itself in efforts to combat drug smuggling, ethnic crime rings, domestic terrorism, and other matters not within the traditional INS mandate. While these are important enforcement activities, I am concerned that the INS not divert itself from its central mission. While interagency enforcement cooperation and intelligence sharing may be appropriate, how can the Committee be assured that the Department is not seeking drug or counter-terrorism enforcement resources, to cite just two examples, through the INS rather than through the DEA or FBI where they belong?

   We agree that investigation of aliens committing serious crimes has not previously fallen within the traditional INS investigative activities. However, INS uniquely has both the expertise and investigative jurisdiction to succeed in such investigations where other law enforcement agencies often fall short. For example, in addition to drug smuggling or other crimes, our experience is that these same aliens also engage in crimes over which INS has exclusive investigative jurisdiction such as alien smuggling, counterfeit immigration documents, illegal entry and others. In these areas, INS ultimately has the ability to pursue the deportation of the aliens involved. Removal from the United States is oftentimes more effective in stemming the criminal activities of these aliens than is lenient sentencing or incarceration of the same participants. Commissioner Nelson is committed to continued investigative emphasis in these areas where aliens are involved in serious offenses.

4. We understand that the Department is reviewing the asylum process. What is the status of this review? Can we be assured that the Department will consult the Committee before changes are made or regulations are issued?

   The Department of Justice is, indeed, actively reviewing asylum procedures and policies at this time. Draft proposed rules are presently under development at the Department. The Department of State and various agencies within the Department of Justice, including INS, have been consulted in this process. The Department of Justice does intend, following Executive Branch review, to consult with the Senate and House Judiciary Committees before final regulations are issued.

Questions for the record from Senator Kennedy continued.

5. After repeated requests by my staff to INS and to the Department, I finally received on March 3 a letter from John Bolton, Assistant Attorney General for Legislative and Intergovernmental Affairs, containing the Department's explanation of the recent arrest by the INS of seven Palestinians residing in California. That letter refers to a two-year joint FBI-INS investigation and states, "Considering the length and seriousness of the investigation and what knowledge the Department has at this time, the charges against the seven Palestinians warrant their custody." If the charges are as serious as this statement suggests, why didn't the FBI, instead of the INS, conduct the arrest and arrange for the prosecution of this group?

The INS, having investigative jurisdiction for immigration related offenses, engaged in a joint investigation with the FBI because the individuals involved in this case are aliens in the United States, suspected of committing unlawful acts for which they could be deportable. It is not unusual for several agencies having overlapping jurisdiction to work collectively using a variety of statutes, to bring cases to successful conclusion. In this case specifically, all aliens have, at this time, been charged with violations of the Immigration and Nationality Act. Their immigration hearings are pending.

QUESTION FROM SENATOR PATRICK LEAHY

- What is the Administration policy with respect to issuance of visas to known Soviet intelligence officers, and in what document is that policy embodied?

- In July 1979, then Associate Attorney General Michael J. Egan, with the review and concurrence of the FBI and the State Department (USDS), established the criteria that the FBI must satisfy, in order to object to a visa issuance. Associate Attorney General Egan established an arbitration process should the USDS disagree with that objection. This process, termed the EGAN AGREEMENT, limits the FBI to two categories: (1) any person who has been positively identified as a staff officer of a hostile intelligence service (HIS), and (2) any person who has been identified within the past ten-year period as a cooptee of a HIS, or a previously identified cooptee who has participated in some form of intelligence tasking within the past ten-year period. While the actual EGAN AGREEMENT uses the verbage "recent", the USDS and FBI have mutually agreed on the ten-year limitation.

Should the USDS desire the subject of the objection to enter the country for policy considerations, diplomatic purposes, or other foreign policy related reasons, the USDS may request the FBI to vacate its objection. If the two agencies can not reach an agreement an EGAN COMMITTEE (convened by the Associate Attorney General), may be requested by either party to determine whether a visa should be issued or not. The Associate Attorney General, who chairs this Committee, is the final authority on visa issuance, as delegated by the Attorney General. This process, and the arbitration role of the Department of Justice, is consistent with the Department's codified legal responsibilities and the Attorney General's obligations as the officer responsible for the internal security of the United States.

QUESTION FROM SENATOR LEAHY

THE LEAHY-HUDDLESTON AMENDMENT OF 1984 REQUIRED ANNUAL SUBMISSION OF A REPORT ON HOSTILE INTELLIGENCE ACTIVITIES IN THE UNITED STATES. THAT REPORT IS TO BE PREPARED BY THE SECRETARY OF STATE AND THE ATTORNEY GENERAL. IT IS DUE IN THE FALL. MY LAST INFORMATION WAS THAT THE REPORT IS AGAIN SEVERAL MONTHS OVERDUE. WHEN WILL THE REPORT BE SUBMITTED TO CONGRESS? WILL YOU PROVIDE A COPY OF THE REPORT TO THE JUDICIARY COMMITTEE?

ANSWER

Our review of the Leahy-Huddleston amendment, 22 U.S.C. 254c-1, indicates that the President is directed to file an annual report on hostile intelligence activities with the House and Senate Intelligence Committees, the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs. Within the Administration, the Department of State has the lead role in preparing this annual report. We understand that the report due in October of 1986 was not filed until February of 1987. The Department of State advises that every effort is being made to see that the 1987 report is timely filed.

With respect to whether a copy of the report will be filed with the Committee on the Judiciary, the fact that the statute specifically designates four Congressional committees to receive the report suggests to us that the intent of Congress was likely that other committees wishing to review the report secure copies from one of the committees listed in the law. Distribution beyond that provided for in the law, therefore, would raise questions which we would prefer to avoid.

Question No. 1

Question From Senator Patrick Leahy: What can you tell us about the evidence against Hamadei that led to his indictment? How did you obtain this evidence?

Answer: The evidence against Hamadei was compiled by the FBI in its role as lead law enforcement agency in international terrorism cases over which the United States has prosecutive jurisdiction. Using normal criminal investigative techniques and processes, the FBI interviewed passengers and crew of TWA 847 when they were released from captivity as well as other witnesses in Athens, Greece, to determine the criminal offenses committed and the perpetrators of those offenses. Among the routine criminal investigative techniques used was the presentation of photographs to witnesses in an effort to identify those responsible for the crimes committed. An overwhelming number of witnesses have identified Hamadei from an array of photographs prepared by the FBI.

Question No. 2

Question From Senator Patrick Leahy: Have you made any progress in extraditing Hamadei, since you agreed to forego the death penalty if he is convicted?

Answer: On January 19, 1987, the United States filed a formal extradition request with the Federal Republic of Germany for the rendition of Hamadei to stand trial on federal charges of air piracy, murder, hostage taking and assaults on aircraft passengers. We are awaiting Germany's response to this request. We understand that the extradition documents have not yet left the German Ministry of Justice, which is the first step in their review of our extradition request.

Question No. 3

Question From Senator Patrick Leahy: When do you expect West Germany to agree to extradite Hamadei? Do they plan to negotiate for the release of the German hostages in return for the release of Hamadei?

Answer: On an average, our extradition requests to Germany are acted on within two to four months. However, there is no time frame within which any country must respond to an extradition request. We have consistently communicated to the Federal Republic of Germany our goal that Hamadei be extradited to the United States. We are confident that the Federal Republic of Germany appreciates our position and we are hopeful that the Federal Republic of Germany will comply with our extradition request. In this regard, we have stressed to Germany the clear priority interest which the United States has in prosecuting Hamadei. Consistent with our position, we have also communicated to Germany our view that Germany should not, under any circumstances, consider the release of Hamadei as a viable option.

Question No. 4

Question From Senator Patrick Leahy: After trading U.S. arms for hostages with Iran, a policy you agreed with, what is the Justice Department doing to convince West Germany that it should not give in to terrorist blackmail?

Answer: I cannot accept the premise which underlies your question. The President has stated repeatedly that the original intent of the relationship with Iran was not to trade arms for hostages. That having been said, our efforts to obtain Hamadei's extradition include the following. Through our Embassy in Bonn and in contacts with the German Embassy here, we have repeatedly emphasized to German officials the importance of Hamadei being brought to justice for the hijacking of TWA 847 and the murder of Robert Stethem. We have also emphasized that the United States has a clear priority interest in prosecuting Hamadei, given the circumstances of this terrorist incident.

Questions from Senator Leahy for Attorney General Edwin Meese regarding Iranian Students.

-How many Iranian nationals are currently in the United States?

As of March 27, 1987, there are 43,821 Iranian nationals, non-immigrant status in the United States.

-How many received student visas last year, and how many will receive visas next year? Are any of these students financed by Khomeini?

For the year 1986, there were 2,492 F-1 visas issued and 574 F-2 visas issued to students.

For next year's figures, the State Department would only be able to estimate, however, the trend is on the decline as the visa numbers for 1985 were 3,492.

As for financing, the State Department has no way of knowing how the students are financed.

QUESTION FROM SENATOR PATRICK LEAHY

- IS THERE A SERIOUS DOMESTIC TERRORISM THREAT FROM IRANIAN GROUPS HERE TIED TO THE IRANIAN GOVERNMENT?

Pro-Khomeini Iranian organizations exist within the United States. As a matter of policy, the Government of Iran has carried out or supported acts of international terrorism and has relied upon such organizations to carry out many of these acts. The FBI has concern regarding the activities of these organizations and is committing appropriate resources to counter possible terrorist activities.

QUESTION FROM SENATOR PATRICK LEAHY

- DO YOU BELIEVE THIS THREAT HAS BEEN EXACERBATED BY U.S. ACTIONS IN THE IRANIAN ARMS FOR HOSTAGE EXCHANGE?

The FBI has developed no information to indicate that the threat of terrorism has been exacerbated by U.S. actions in the Iranian arms for hostage exchange.

QUESTION SUBMITTED BY SENATOR ARLEN SPECTER

Question

Please comment on the analysis by Commander E. Anthony Fessler, see attached, of the propriety under United States and international law of the use of limited force to apprehend terrorists, who have committed crimes against Americans, from foreign nations that provide them with sanctuary and refuse to cooperate with more traditional extradition methods. In particular, your comments should address Commander Fessler's analysis of the application of the four customary international law principals governing the "self-defense" doctrine to the question of the appropriateness of terrorist apprehensions.

Answer

The Department has examined the material furnished by Senator Specter. The material appears to be an extract consisting of pages 59 to 66 from a paper prepared by Commander E. Anthony Fessler, JAGC, USN, entitled "Extraterritorial Apprehension As A Pro-Active Counterterrorism Measure." Senator Specter's submission did not include the relevant footnotes. The provided material has two sections. The first section is labeled "Self-Defense Under the United Nations Charter" and the second is labeled "Self-Defense as a Basis for Intervention."

The Department believes that the first section is an accurate, fair, and correct presentation of the relevant international law. We also are in basic agreement with the second section. However, the whole issue of extraterritorial apprehension is a very complex one and its successful utilization depends upon a multitude of varying factors. If any such activity were to be undertaken, an experienced federal prosecutor would have to be completely involved in the operational decision making process as any change in the facts could seriously alter the legal consequences.

Senator Hatch

Questions from Chairman Biden of the Senate Judiciary Committee for Attorney General Meese in connection with the FY 1988 Authorization Hearing on March 4, 1987.

Question: Mr. Attorney General, as reflected in your statement, the Justice Department recognizes the growing overcrowding problem which exists in the Federal Prison System and has asked for increased funding for prison construction. Today, as you stated, the rate of overcrowding approaches 50 percent.

What impact will the funds you have requested have on the rate of overcrowding and what do you foresee as the future needs in prison overcrowding?

Answer: Since 1981 we have increased Federal Prison capacity by 4,500 beds through expansion at existing institutions, acquisition and conversion of surplus properties and construction of new institutions. During 1987 the Bureau of Prisons will complete several expansion projects at existing institutions which will add an additional 1,200 beds. In addition, construction funds have already been appropriated for seven new correctional facilities which will eventually increase capacity by 4,800 beds.

The Department's FY 1988 budget continues this expansion program with $130.2 million requested for the construction of two new Federal Correctional Institutions, six capacity expansion projects at existing institutions, and a new Federal detention unit. If approved, this request will eventually provide an additional 2,400 beds.

The capacity expansion plan reflected in the Bureau's 1988 budget for the period 1989 - 1992 would further increase the capacity of the Federal Prison System by 7,200 beds to 44,180 by 1993. Our ultimate goal is to increase prison capacity to keep pace with the projected growth in inmate population and reduce the level of overcrowding to about 20 percent by the mid 1990's.

If the inmate population projection of 55,200 by 1993 is accurate, these capacity expansion plans would very nearly achieve this goal. However, this estimate, which was prepared last year, does not take into consideration the potential impact of the recently enacted Anti-Drug Abuse Act or the sentencing guidelines to be submitted to Congress in April this year by the U.S. Sentencing Commission. The Bureau of Prisons is working closely with the U.S. Sentencing Commission in its efforts to determine the impact of sentencing guidelines on the Federal inmate population. It is highly likely that the results of this effort will require the future revision of current capacity expansion plans.

QUESTION FROM SENATOR HATCH

Question 2: MR. ATTORNEY GENERAL, IN THE BUDGET PROPOSAL FOR THE ANTITRUST DIVISION, THERE IS A REDUCTION OF ABOUT 100 PERSONNEL SLOTS.

DOES THIS REDUCTION INDICATE A SHIFT IN THE PRIORITY THAT THE DEPARTMENT WILL PLACE ON ANTITRUST ACTIVITY, OR DOES IT SIMPLY REFLECT BUDGET TIGHTENING ACROSS THE BOARD?

Answer: The proposed reduction for the Antitrust Division for fiscal year 1988 does not reflect a shift in priority for antitrust enforcement. The Department fully supports the important goal of maintaining a strong antitrust enforcement presence in our economy. The cuts proposed for the Division are driven by the need to cut the federal deficit, not by an attempt to achieve some other policy objective.

We fully expect that the Division will be able to continue to fulfill its essential law enforcement responsibilities by focusing on the core programs of prosecuting criminal conduct and evaluating mergers and acquisitions with the budget we have proposed. We anticipate that the proposed reduction in resources for fiscal 1988 will be attained through attrition, and will be applied primarily to the Division's amicus and competition advocacy programs, general policy and economic analysis, management, and administrative support. Much of these savings in resources are possible by reason of improved efficiency, better use of staff and automated resources, and streamlined reporting, economic analysis, and support functions.

QUESTION FROM SENATOR HATCH

Question:

Mr. Attorney General, the Department has proposed that the Antitrust Division be included in the funding for General Legal Activities like the other litigating divisions. Would you please explain the need for this change?

Answer:

The transfer of the Antitrust Division and the U.S. Attorneys to the General Legal Activities appropriation will consolidate the Department's litigating organizations into one appropriation. It is anticipated that this consolidation will improve management responsiveness to litigation crises and will facilitate the implementation of management and productivity improvements such as shared support systems or services. In fact, the Congress has already agreed to allow the Department to use resources from the GLA appropriation to fund office automation systems in, not only the legal divisions, but also the Antitrust Division and the U.S. Attorneys. Consolidating these accounts will provide maximum flexibility without usurping the Congress' prerogative to appropriate resources at the program level. The Congress can be assured that we will be very diligent in reporting reprogramming actions within the GLA appropriation and the Congress will be notified fully of any programmatic proposal developed by the Department's policy level.

Consolidation of these appropriations would emphasize the Administration's commitment to streamlining its operational processes and ultimately save the taxpayers money. The public benefits most by our efforts to provide legal services unencumbered by the rigors of a technical appropriation structure. Flexibility is the key if we are to be successful in combatting today's criminal element. With appropriate oversight and guidance from the Congress we can work together to maintain a safe and just society.

Question from Senator Hatch

4. Mr. Attorney General, you mentioned in your testimony that funds have been requested for the United States Trustee program.

When does the Department anticipate that this program will become self-funding?

The program should become self sufficient after the two year transition to a nationwide program is complete.

We are requesting that none of the filing fee collections be used to offset appropriations for the United States Trustees during 1987 and 1988, the two transition years. During transition, receipts from higher filing fees in all cases will be deposited in the Fund, and deposits from chapter 11 quarterly fees will grow as additional chapter 11 cases in new districts become subject to the fees.

If Congress approves our request, we anticipate that deposits to the United States Trustee System Fund from filing fee collections and quarterly maintenance charges will accumulate adequate deposits so that, beginning in 1989, the Congress can appropriate from the Fund all monies needed to operate the nationwide United States Trustee system.

Question from Senator Hatch.

Mr. Attorney General, the Administration has consistently recommended termination of the Juvenile Justice Program. However, Congress has just as consistently been unwilling to accept this recommendation. Did the Department consider the historical opposition of Congress to this program termination in considering its budget recommendation for Fiscal Year 1988?

Answer:

The primary reason the Department is not requesting funds for this program is that the deficit precludes funding of many worthwhile programs.

The Department understands the views of Congress, and this is a subject on which I think that it is possible to work out an accommodation in the course of this year. As a matter of priorities as to the Federal role, juvenile justice, while a very important function of state and local law enforcement, is not really a Federal role.

Question from Senator Hatch.

Mr. Attorney General, as you stated in your testimony, the Administration has again recommended termination of all funding for the Regional Information Sharing System. I continue to hear from those who believe that this program plays a vital role in state and local law enforcement efforts. What is your assessment of the value of this program to law enforcement efforts at the state and local level, and how will its termination affect those efforts?

Answer:

I have discussed the RISS programs repeatedly with leaders of law enforcement throughout the country, and most recently with representatives of the International Association of Chiefs of Police. I think there is recognition on the part of the local chiefs that, first of all, the programs are valuable, and I think so too. I think it is a valuable part of law enforcement cooperation on a regional basis. Many of the chiefs I have talked to have admitted that they recognize this is a local expense and should be a local expense, and that the Federal funds initially were provided essentially to get the equipment in place and for start-up costs. What was originally a short-term type of project has now been extended for several years beyond what was intended when the Federal funding of these programs were originally started. We think that the time is now for the regions, for the states that are within those regions, to pick up the cost of these information and intelligence systems, and that this could be done without an awful lot of cost on the part of any one state.

QUESTION FROM SENATOR HATCH

Question:

Mr. Attorney General, as you testified, the Anti-Drug Abuse Act of 1986 established a program to provide grants to State and local governments for use in drug control and enforcement efforts. Under this program, $225 million will be provided to the States during 1987. The Department has not requested any budget authority for this program for 1988, even though it is authorized for three years. If the Department sees positive results from this program during 1987, will you ask for a supplemental appropriation for 1988?

Answer:

The Department does not expect to see the results of this program during 1987 because during this year, States will only begin to implement the program. States have three years to use the funds, and we anticipate that we will be working with the States that entire time to aid them in developing an effective strategy for dealing with drug control. Our grant programs were never intended to be sources of permanent, ongoing funding for local programs. The Federal role must be that of encouraging the development of, rather than sustaining, locally based programs to deal with drug abuse. Therefore, we do not, at this time, expect that we will be requesting additional supplemental resources for 1988.

Question from Senator DeConcini

Q: Mr. Attorney General, last year the Marshals Service proposed a reorganization and new authority for itself in a bill introduced by Senator Denton. I heard from many federal judges across the country that the new authority sought by the Marshals Service was unnecessary and in fact would result in disruption of the vital work of the Marshals Service and the Courts. I note that the 1987 Department Authorization includes hefty increases for the Marshals Service.

Can you tell me what justifies the more than $50,000,000 increase for the Marshals?

A: First of all, it should be pointed out that the United States Marshals Service Act, both as introduced in the 99th Congress and as redrafted for introduction as a separate bill in the 100th Congress, contains no "new authority" for the Marshals Service, nor would it provide for a reorganization of the Service. Rather, the Act would clarify the current authorities and organizational structure of the Service under existing statutes and regulations.

As redrafted for submission to the Congress this year, the Act will address the concerns expressed by many judges last year. Specifically, the revised bill will retain the current language of 28 U.S.C. section 569(a) which provides that marshals "may, in the discretion of the respective courts, be required to attend any session of court." The Act will also provide for a realistic level of payment of court bailiffs, thus providing a means to assure the courts of appropriate personnel to attend to the non-law enforcement requirements of judicial proceedings.

With respect to the $51.2 million increase requested for the Marshals Service, over $33 million — almost two-thirds — is for uncontrollable costs and a transfer between appropriations. This includes $17.5 million for the proposed transfer of the Protection of Witnesses program from the Fees and Expenses of Witnesses appropriation to the Marshals Service appropriation, and $15.5 million to fund uncontrollable increases. Over $10 million of the uncontrollable cost is for the new pay and retirement programs. The other $5 million is needed for increases in building rents and similar costs.

Only about one-third of the total increase, $18.2 million, represents actual program increases. Even these result from factors over which the Marshals Service has little control. The implementation of the Comprehensive Comprehensive Crime Control Act and the Administration's initiatives directed against drug traffickers and major criminals have caused the Marshals Service workload to increase noticeably. For example, in connection with judicial security, time for criminal proceedings will increase 20 percent from 1986 to 1988, and the number of threats against the judiciary will rise by one-third during that same period. Therefore, more than half of the requested program increase, 196 positions and $9.3 million, is earmarked for enhanced activities for security of the judicial process and protecting endangered witnesses.

Movement of prisoners through the National Prisoner Transportation System (NPTS) will approach 100,000 in 1988, again an increase of one-third in a two-year time period. NPTS remains the safest and fastest way to move prisoners long distances and produce them within court-ordered deadlines. In fact, the average cost per prisoner of a Marshals Service airlift is more than six times less expensive than a comparable commercial air trip. An additional 18 positions and $5.2 million will be used for essential improvements for NPTS and for additional support to the District of Columbia Superior Court.

Another $1.5 million is designated for renovations to holding cells and prisoner handling areas. Upwards of 20 percent of all Marshals Service holding cells are in urgent need of repair. The increase will provide funds for five of the most critical projects.

To meet an anticipated 84 percent increase in extraditions from 1986 to 1988, an additional $300,000 is requested. This reflects both the international nature of the drug problem and the costs associated with safe and prompt extradition.

Finally, 10 positions and $1.9 million is sought for necessary administrative improvements in direct support of the operational mission. This includes $1.3 million for ADP enhancements for prisoner transportation, threat analysis and district automation. Another $600,000 is requested for for employee assistance, background investigations, and other administrative support.

QUESTION FROM SENATOR DECONCINI

Question: I want to make sure that none of the increased authorization for the Marshals Service assumes any of the new authority requested, but not granted, last year.

Answer: As noted previously, the U.S. Marshals Service Act (the "Act") would not provide any "new authority" for the Marshals Service; rather, it would clarify the current authorities and organizational structure of the Service under existing statutes and regulations.

The Department's budget authorization request for FY 1988 does not assume any new authority for the Marshals Service. Moreover, nothing in the Act would require any additional budget authority for the Marshals Service.

Question from Senator DeConcini

Q. I am concerned that the Marshals Service is becoming involved in activities that are more appropriate for the F.B.I. I would like to have you submit for the record a more elaborate explanation of the authorization and budget requirements for the Marshals Service.

A. The central mission of the Marshals Service, as originally mandated by the Judiciary Act of 1789, has remained basically the same: to support the functions of the district and circuit courts and to execute all lawful precepts issued to the Marshal under the authority of the United States. However, the methods by which the Marshals Service fulfills its mission have necessarily changed and multiplied greatly over the years as the nature and complexity of our responsibilities have increased.

All activities of the Marshals Service are authorized under existing law, including statutes, regulations and orders of the Attorney General. The legislative proposal submitted to the 99th Congress sought to modernize and consolidate statutory provisions relating to the Marshals Service that are currently scattered over 13 sections of the U.S. Code. It was intended to clarify and provide explicit authority for the functions that have been performed by the Marshals and their deputies for almost 200 years. It did not propose to expand or alter the historic role of the Marshals in the federal justice system.

A detailed explanation of the requirements for the Marshals Service Salaries and Expenses, Assets Forfeiture Fund, and Support of U.S. Prisoners appropriations follows.

Salaries and Expenses

For 1988, $216,092,000, 2,948 permanent positions, and 3,933 full-time equivalent workyears are requested for the Marshals Service appropriation. This is a net increase of $51,242,000, 224 positions, and 139 FTE workyears above the 1987 appropriation anticipated.

The Marshals Service is charged with protecting basic Constitutional rights by maintaining the security and integrity of the judicial process. The primary responsibilities for protecting the federal judiciary and endangered witnesses, executing warrants and court orders, managing seized assets, and maintaining custody of unsentenced prisoners are central to this mission. Because of the Service's unique role in the administration of justice, it must respond to workload demands largely beyond its control. What the Service does, or fails to do, in response to demands affects all facets of the judicial process.

It is primarily because of external factors that the Service requests an additional $18.2 million and 224 new positions for 1988 program increases. Ongoing concern for enhanced security and prisoner productions, as well as added responsibilities resulting from the government's drug initiative and and mandated program changes all contribute to this need.

The resources requested address these problems in a comprehensive and coordinated fashion. The major activities and resource requirements are summarized below.

Witness Security

The Marshals Service's Witness Security Program remains the government's most effective way to obtain testimony against members of organized crime and and drug traffickers. In trials where protected witnesses testify, four out of five result in conviction. However, providing for the care and safekeeping of these individuals is extremely costly. By 1988, it is expected there will be over 5,900 witnesses in the program, a 14 percent increase above the 1986 level. Moreover, witnesses and family members must receive the support they need to survive in a protected environment. To ensure the continued safety of these witnesses and their family members, and to operate the new

Washington, D.C. area safesite and assessment center requires 36 new positions and $1,141,000 in 1988.

Fugitive Investigations and Court Orders

As additional funds are appropriated each year to develop cases and try members of criminal organizations and narcotics violators, more resources are needed to apprehend those who flee the criminal justice system. Often those who escape return to their former practices. Marshals Service involvement in international extraditions continues to grow, and is projected to increase to 250 extraditions in 1988, 84 percent above the 1986 level. People we extradite are among the most publicized and dangerous in the world and include Latin American drug dealers such as Jose Antonio Cabrera-Sarmiento and Severo Escobar. To ensure adequate resources are available to meet these these needs, the Marshals Service requests an additional $300,000.

Judicial Security

Protection of members of the federal judiciary and court facilities is the Marshals Service's highest priority. However, protecting the over 1,800 federal judges and magistrates and almost 500 federal court facilities is becoming more and more difficult. Not only does the time devoted to criminal proceedings continue to grow--it is projected to rise 20 percent from 1986 to 1988 -- the types of cases we now face are becoming increasingly dangerous and complex. Trials involving drug dealers and organized crime are now assuming international proportions. And the threats and violence displayed by groups such as the Macheteros, Carlos Lehder-Rivas of the Medellin drug cartel and the May 19th Communist organization demand extreme security be provided. Threats against the judiciary are projected to increase one-third from 1986 to 1988.

When placed in the context of more and longer court proceedings, and a growing number of threats and violence, the Marshals Service needs become obvious. To meet the increased responsibilities in this area the Marshals Service requests 160 positions and $8,126,000 for judicial security, including 42 positions and $2,263,000 for enhanced security as a direct result of the government's accelerated drug apprehension efforts.

ADP and Telecommunications

The data requirements placed on the Marshals Service are staggering. Each year 80,000 warrants are received, some 170,000 prisoners transported, over 250 threats analyzed, and about 250,000 checks issued and 170,000 vouchers certified. Yet, full automation is lacking. Presently, less than a third of the districts can use the Warrant Information Network, and only 12 have automated accounting. Moreover, enhanced management information is is necessary to improve prisoner transportation and analyze threats in a timely fashion.

Only through improvements in automation and modernization are savings in time and effort realized. For 1988, four new positions and $1,341,000 will be required to improve the automated threat analysis capability; for enhanced automated ticketing and maintenance scheduling for NPTS; and for similar improvements in warrants information, prisoner data and accounting.

Field Support and Training

The Marshals Service has assembled the most comprehensive and sophisticated training program to develop the best operational deputies possible. Specialized classes in officers survival and protective services help prepare the workforce for the complex and dangerous Marshals Service missions. No increased resources are requested for 1988.

Handling of Federal Prisoners

The growing overcrowding of federal jails and the increased length of prisoner stays continue to present increased demands on the Marshals Service. Each prisoner is presented to court an average of three times while under

Marshals Service custody. Given the surge in the prisoner population—the Service has about a third more prisoners in its custody than it did just two or three years ago — we now have prisoner transportation requirements which are increasing 10-15 percent annually. Arrests generated as a result of the government's new drug initiative will only accelerate this trend.

National Prisoner Transportation System (NPTS) improvements are a major component of the Marshals Service's 1988 budget submission. In that year, NPTS movements could easily reach 100,000. An average NPTS movement costs about $112 per prisoner, over six times less expensive than a commercial airflight. NPTS is also much safer for the public, our personnel and the prisoners themselves.

The 1988 budget request includes an additional $4,047,000 and 10 posi- for NPTS. This is for essential improvements including deployment of a second large aircraft, performance of major maintenance on existing aircraft, and introduction of efficiencies in ticketing and scheduling. Improvements such as these are necessary if we are to realize even greater efficiencies.

An additional 8 positions and $1,106,000 are requested for requirements associated with the District of Columbia Superior Court. Resources are needed for an on-site Marshals Service presence for U.S. Attorney offices and grand jury facilities at the new Judiciary Center building, to ensure appropriate safeguards are followed in transporting prisoners between this building and the D.C. District and Superior Courts; for necessary detention facilities; and to relocate Marshals Service personnel and equipment from the D.C. District to Superior Court.

Organized Crime Drug Enforcement

The Marshals Service coordinates fugitive felon investigations, witness relocation and protection, prisoner transportation, judicial security, and asset forfeiture in support of the Task Forces. Service personnel also actively participate in drug, financial, and other Task Force investigations. The effect of the Task Forces on the workload of district office support personnel, and increases requested to support this workload, are described in the Fugitive Investigations and Court Orders, Judicial Security, and Handling of Federal Prisoners programs. No increased resources are requested for 1988.

Management and Administration

This program provides necessary services to support the complex and diverse missions of the Marshals Service. To improve administrative and program coordination for 1988, the Service requests six new positions and $600,000. Also, an additional $1,540,000 is required in 1988 for renovations to holding cells and prisoner handling areas. These renovatious are critically needed to improve security and safeguard public access areas.

Protection of Witnesses

For 1988, the Marshals Service again proposes that the "Protection of Witnesses Program" in the Fees and Expenses of Witnesses appropriation be transferred to the Marshals Service appropriation. Witness protection costs such subsistence and travel for witness/family visits, and safesite construction are directly related to the Witness Security program operated by the Marshals Service. They are also distinctly different from the fact and expert witness costs typically associated with the Fees and Expenses appropriation. It makes more sense, both programmatically and administratively, to include both Protection of Witnesses and Witness Security functions under the Marshals Service appropriation. No increased resources are requested for 1988.

Assets Forfeiture Fund

The Assets Forfeiture Fund is designed to ensure that sufficient resources to secure, maintain, and dispose of seized and forfeited properties are available and that the amount realized by the United States from forfeited properties is maximized. Forfeited cash and proceeds from the sales of forfeited properties are deposited to the Fund, and are made available by means of an appropriation for payment of expenses necessary to seize, detain, inventory, safeguard, maintain, advertise or sell property under seizure or forfeited under any law enforced or administered by the Department of Justice. Further, these receipts are available to pay valid liens and mortgages against forfeited property, as well as to pay amounts in remission or mitigation of forfeitures, for the purpose of protecting innocent lienholders' interests and to facilitate the sale of forfeited property on terms most advantageous to the Federal Government.

The Fund will also be available, to the extent that deposits to the Fund exceed the amounts needed for the "management" expenses described above, to pay certain "program-related" expenses, such as awards for information or assistance in drug enforcement cases; costs of equipping conveyances for drug law enforcement functions; and the purchase of evidence of violation of the Controlled Substances Act or the Controlled Substances Import and Export Act.

Before the passage of the Comprehensive Crime Control Act of 1984, expenses related to the seizure and forfeiture of property pursuant to court orders were paid from agencies' salaries and expenses appropriations. To the extent possible, costs were recovered from proceeds of sales of forfeited property. However, there was no guarantee that a forfeiture action would result in the sale of property, or that sales proceeds would cover all costs. Investigating agencies have been reluctant to incur costs that may not be recovered, and have been unable to predict and budget for such costs. These and other budgetary uncertainties have made seizing agencies reluctant to further strain their operating budgets with costs of managing and caring for assets subject to forfeiture. The Assets Forfeiture Fund is a more suitable funding mechanism in promoting proper maintenance and more effective sales of forfeited property and property subject to forfeiture.

The Marshals Service estimates that total receipts to the Assets Forfeiture Fund in 1988 will amount to $140,000,000, obligations are estimated to be approximately $120,000,000.

Support of U.S. Prisoners

For 1988, a total of $76,914,000 is requested for the Support of U.S. Prisoners appropriation. Of this amount, $71,914,000 will be used to pay for the support, housing and safekeeping of unsentenced federal prisoners, probation/parole violators, and alien material witnesses in Marshals Service custody and $5,000,000 will be for the Cooperative Agreement Program (CAP).

The Support of U.S. Prisoners appropriation provides funds for the care, housing, and safekeeping of federal prisoners in the custody of the Marshals Service at a level of subsistence which meets nationally accepted standards for detention and holding facilities. This mission is accomplished through the negotiation and administration of approximately 825 agreements with State and local detention facilities located throughout the United States. The appropriation also supports the Cooperative Agreement Program which is designed to assist the governments of states, territories, or political subdivisions thereof, in the necessary upgrading, physical renovation or construction of their detention facilities in exchange for guaranteed housing for federal prisoners for a specific period of time. This program also provides for the acquisition of excess federal property and technical assistance to State and local governments which provide housing for federal prisoners. The major initiatives and resource requests are summarized below.

Care of U.S. Prisoners in Non-Federal Institutions

This activity is responsible for providing adequate medical and hospital guard services as well as housing and subsistence for federal prisoners in the custody of the Marshals Service. During 1988, this program will require $66,364,000 for jailday payments at a projected daily rate of $38.85, as well as $5,550,000 for medical care, guards and other expenses. The request for the first time, will make funds appropriated to this program available until expended.

Cooperative Agreement Program

The Cooperative Agreement Program (CAP) is designed to obtain guaranteed housing for federal prisoners in State and local detention facilities in or near federal court cities. At the same time, CAP helps to improve the conditions of confinement in these facilities in accordance with national, State and local detention standards. For 1988, $5,000,000 is requested to be available until expended to fund an estimated two major CAP agreements with State and local governments.

Question from Senator Dennis DeConcini

Can you tell us how the new U.S. Attorney positions will be allocated? How many will be doing drug prosecutions? How many will be in the Southwest? How many will be in Arizona?

Answer: It is assumed that the first part of your question refers to the new positions for fiscal year 1988. Some of the factors considered when allocating positions to the U.S. Attorneys' offices are:

(1) the number of judges in the district;
(2) the number of magistrate workyears;
(3) the number of cases handled;
(4) grand jury hours;
(5) the number of trials;
(6) the number of long trials;
(7) the number of staffed branch offices;
(8) attorney travel time;
(9) the population within the district; and
(10) special initiatives or considerations within the district.

In fiscal year 1987, there were 90 new positions authorized for the purpose of combatting the drug importation problem in the Southwest for states which border Mexico. These were authorized under the "Operation Alliance" initiative. Two additional attorney positions were allocated to the Eastern District of Pennsylvania for the Interagency Drug Task Force Demonstration

Program. In fiscal year 1988, 417 of the 673 positions requested will be dedicated to drug prosecutions. The 417 positions include 205 attorneys. To date, all 90 positions (60 attorneys and 30 support) which were authorized in fiscal year 1987 for Operation Alliance have been allocated. Of the 90 positions, 11 attorney and 6 support positions were allocated to Arizona.

Question: from Senator DeConcini

Can you tell us why the Department is asking to abolish the state and local assistance programs?

Answer:

In crafting its Fiscal Year 1988 budget, the Department has taken care to ensure that adequate resources are provided for its core functions -- those functions that can only be carried out on the federal level. We believe that scarce federal dollars should be used for uniquely federal functions, and that is why this Administration has sought each year to fund adequately the programs of the Bureau of Prisons, United States Attorneys, U.S. Marshals Service, Drug Enforcement Administration, and Federal Bureau of Investigation.

To be sure, we will continue to work closely with state and local governments in our fight against drugs. In this regard, the Department already administers a major program that significantly assists the states in their drug enforcement efforts --. the Asset Forfeiture Program. We believe the equitable sharing of assets seized from drug dealers and others and forfeited by them is a better way for the Federal Government to assist the states and localities.

Sharing for this fiscal year is estimated at $28 million, with an FY '88 projection to top $30 million. When the President's FY '88 drug budget was prepared, this form of help for states and localities was taken into account. We believe this type of sharing represents the approach we should pursue with regard to states and localities and should replace the award of out-and-out federal grants.

Question:

Do you have evidence that the program is not working or has been abused?

Answer:

The Department certainly has no evidence that the programs funded by the Bureau of Justice Assistance through the Justice Assistance Act of 1984 or the Anti-Drug Abuse Act of 1986 have not worked or the funding has been abused in any manner. However, after three years of funding under the Justice Assistance Act of 1984, the states and localities have had ample opportunity to find out if the projects they have funded with federal funds have resulted in increased efficiency and/or should be willing to use their increased revenues to continue these projects.

QUESTION FROM SENATOR DENNIS DECONCINI

Question:

Your budget proposes to reduce the life of the Drug Enforcement Assistance Fund from three years to one. The purpose of this program is to give the States "seed money" to set up drug enforcement and education programs. The idea is that giving the State agencies the initial funds necessary to put a program in place, and to demonstrate its success, will make it more likely that State legislatures will be willing to pick up the tab once the three year Federal funding runs out.

I have met with law enforcement officials from several States, and what they are proposing to do with this money is to set up just the kind of comprehensive, coordinated, education and enforcement programs that we need to combat drugs in this country. Reducing the life of this program to one year will make it very difficult for State agencies to hire the necessary personnel and get a program up and running before the Federal funds run out. Providing Federal funding for one year is only going to permit piecemeal measures that aren't very effective.

Don't you think that cutting the duration of this program really eliminates its chances for success? Do you really believe that State and local law enforcement will be able to implement and evaluate a large scale, comprehensive program in only one year?

Answer:

Although funds would be appropriated for one year (fiscal year 1987), the States have three years to obligate these funds - the fiscal year of the award plus two additional years.

The Bureau of Justice Assistance (BJA) has moved swiftly to implement this program while being careful to obtain the maximum amount of input from Federal, State and local agencies. The Anti-Drug Abuse Act was enacted on October 27, 1986. By November 7, 1987, BJA sent letters to all governors or chief executives notifying them of the new assistance program and requesting that a State agency to administer the program be designated. Each State had designated an office by February 27, 1987, and because of this, they are all expected to participate.

In order to assist the States in preparing the drug strategy and in setting up the necessary administrative procedures, the Office of Justice Programs permitted the States to apply in advance for an award of their administrative funds. To date, 32 States have received an award of their administrative funds, which totals ten percent of the State's formula grant.

Three regional workshops are being held in March 1987 to assist the States in designing their drug law enforcement strategies and to effectively administer the program. Each State will submit to BJA a Statewide strategy prior to receipt of its total formula grant award. The Department of Justice will make technical assistance for the States available from the Federal Government.

Given the three-years that States have to obligate the funds and the on-going assistance provided during this time period by the Federal Government to develop and implement the programs, we anticipate that the States will be in a good position to implement and evaluate what we expect will be a successful program.

QUESTION FROM SENATOR DECONCINI

Q: I am very concerned, however, about two aspects of the Policy Board. First, does the reorganization address the problem of the decisions of the Policy Board not being final? I am disturbed that the Policy Board has no ability to insure that it's decisions are carried out, but I am even more disturbed that agencies and Departments of the Federal government are under the impression that they are free to ignore or modify the Board's decisions. Can you assure us that the Board will really be in charge?

A: The authority of the Policy Board is undisputed among the member departments. Although it is not always easy for some agencies to change the ways of the past and recognize a new leadership concept in drug enforcement, the affected departments and agencies understand the necessity and purpose of the Board's ultimate decision making authority.

When the Policy Board examines an issue, it does so after the issue has been carefully considered at lower levels within the organization. Issues that can be resolved at the staff and working levels do not require further debate at higher levels. When there is no consensus at the staff and working group levels, however, issues are presented to the Coordinating Group for resolution. In most cases, for most issues, the Coordinating Group agrees on specific courses of action. When disagreements still exist and cannot be resolved at the Coordinating Group level, these matters are presented to the Policy Board for final resolution. The Policy Board members--all Cabinet officers--work as a team in making decisions consistent with Administration policy and the national interest. In the rare event that the Policy Board could agree, the matter would be taken before the President for resolution. All decisions are made after significant interagency discussion, sometimes at the highest levels.

Question from Senator DeConcini

Q: Second, I am disturbed about the lack of coordination in the Federal Government concerning funding and the allocation of resources to fight the drug menace. Your statement says, "the new Policy Board will develop budget priorities for all of the agencies with a drug role."

Does this mean that the Board will establish funding levels of the agencies and departments? Does it just mean that the Board will recommend funding levels to the agencies and departments? What is the role of OMB in this process?

A. For the FY 1988 budget process, OMB served as our budget advisor by briefing the Board concerning estimates of Federal drug control resources and proposed budget action.

I would expect in the ensuing fiscal years that more of the Board's deliberations will be devoted to the budget process to ensure that scarce Federal resources are being spent wisely, whether on supply or demand functions. To the extent the Board disagrees with OMB budget recommendations in the future, we would appeal such recommendations to the President.

Additionally, it should be understood that the National Drug Policy Board plays a role in the budget process not only in reviewing agency submissions during the normal budget cycle, but also in more subtle and indirect ways by influencing the makeup of those submissions. Through its various subcommittees and working groups, the Board, its Coordinating Group, and Staff are constantly evaluating various policy and resource issues which, once resolved, will be reflected in appropriate budget submissions. So, we are not content to merely look at the submissions once they are compiled. We intend to have a considerable say-so in what is in them to begin with by making longer-term policy decisions.

QUESTION FROM SENATOR HEFLIN

Q. - Mr. Meese, ever since the 1978 Ethics in Government Act was passed, there have been questions concerning its constitutionality -- I recently read that Assistant Attorney General Chuck Cooper said that if the constitutionality of the law was appropriately challenged in court, the Justice Department would join in the effort to overturn the statute. Will the Justice Department join in an effort to overturn the statute on constitutional grounds?

A - It is true that this Department has repeatedly voiced doubts about the constitutionality of certain aspects of the independent counsel provisions of the Ethics in Government Act. In his recent testimony before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, Assistant Attorney General Bolton noted the numerous occasions since 1973 on which officials of this Department have appeared before congressional committees to express concern over the constitutionality of legislation that would remove the function of prosecuting crimes from the Executive and lodge it in an individual who is neither appointed by nor removable by the President or the Attorney General.[1]

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[1] Mr. Bolton's testimony noted that in 1973 Acting Attorney General Bork, testifying before the House Judiciary Committee, objected on constitutional grounds to a bill that would have provided for judicial appointment and removal of a special prosecutor. He argued that the prosecution of crimes is an executive function which cannot constitutionally be controlled by the judiciary. In 1974 and 1975, Department of Justice officials testified before the Senate Judiciary Committee on a variety of bills to create a permanent prosecutorial office that would operate independent of the President's supervision and control, concluding in each case that under our system of government the prosecution of crimes is a core executive function which cannot be removed from the control of the Executive. In 1976, Attorney General Levi raised constitutional objections before the Subcommittee on Criminal Justice of the House Judiciary Committee to provisions in a bill quite similar to the special prosecutor legislation finally enacted in 1978. Testifying before a Senate Committee on another piece of legislation that same year, Deputy

In 1981, Attorney General Smith informed the Senate Legal Counsel of the grave doubts the Department entertained over the statute's constitutionality, and stated that the Department would espouse views consistent with these doubts if our position was sought in particular litigation. See letter of April 17, 1981 (attached). However, he also confirmed the Department's intention to continue to comply with the provisions of the law "until there is a statutory change or a judicial declaration of unconstitutionality." There has been no change in the Department's position in this regard and, as you know, we have in fact proceeded in accordance with the statute's requirements in a number of recent cases.

I should also note the Department's intention, insofar as it is possible, to interpret and apply the Act in a manner that does not give rise unnecessarily to constitutional issues. Thus, for example, we do not believe the Act should be construed to authorize the court responsible for appointing the independent counsel to expand the jurisdiction of the independent counsel to include matters which the Attorney General has already determined should not be prosecuted. We believe that the provision in 28 U.S.C. 594(e) that in isolation might erroneously be read to

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[1] Cont. Attorney General Tyler also objected to the limitations placed on the Attorney General's power to remove a court-appointed special prosecutor. In 1981, during the reauthorization hearings on the Ethics in Government Act, Associate Attorney General Giuliani testified before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, urging modification of the special prosecutor statute on grounds that it improperly insulates the exercise of an executive function from the control of the President.

authorize the court alone to refer a matter to the independent counsel must be read in harmony with the provision in 28 U.S.C. 592(b) that makes the Attorney General's decision not to refer a matter to the independent counsel final and unreviewable.

QUESTION FROM SENATOR HEFLIN

Q - Do you feel that the Office of Independent Counsel is an inferior office such that Congress could allow a court of law to appoint an independent counsel -- given that the statute says that the Independent Counsel has "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any officer or employee of the Department of Justice"?

A - As Assistant Attorney General Bolton pointed out in his recent testimony before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, and as the question suggests, independent counsel appointed under the Ethics in Government Act are not, on the face of the statute, subject to the direction and control of any other officer in the performance of their duties. It is thus at least arguable that they are not "inferior officers" insofar as that term necessarily implies the notion of being subordinate to a superior. However, the Act does not provide for presidential appointment and Senate confirmation, and the Act's legislative history indicates that Congress intended independent counsel to be considered "inferior officers" under the Appointments Clause. See H.R. Rep. No. 1307, 95th Cong., 2d Sess. 5 (1976); S. Rep. No. 823, 94th Cong., 2d Sess. 24 (1976). Thus, we believe independent counsel cannot be considered anything but "inferior officers" under the Appointments Clause of the Constitution, regardless of their statutory duties or independence.

QUESTION FROM SENATOR HEFLIN

Q - Would you favor a change in the current law which would allow for the appointment of a special prosecutor by the President with the advice and consent of the Senate, but with a provision that the President may only remove such special prosecutor for cause?

A - As noted, this Department has in the past and recently expressed some doubt as to the constitutionality of lodging in a court authority to appoint an official whose functions are purely executive. Accordingly, we would support a change in current law that would substitute presidential for court appointment of an independent counsel. However, we would be concerned that a requirement of Senate confirmation for an independent counsel might prove time-consuming and otherwise burdensome, especially since the context of such appointments often necessitates expeditious handling.

With respect to the question of removal, we have also taken the position that any statutory restriction on presidential removal of a federal prosecutor must yield to the explicit constitutional responsibility of the President to direct the prosecutor's execution of the laws. In his recent testimony before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, Assistant Attorney General Bolton stated that

> Under our constitutional system of separation of powers, the President, or his delegate, must retain the unfettered ability to direct and supervise all executive officials. Accordingly, no congressional restriction on the removability of officials in the executive branch may assume a form that would interfere with the President's supervision of the unitary executive. Although the Constitution clearly contemplates that subordinate executive officials will be created by statute, the Constitution itself creates no such offices, and it does not require the

> creation or continuance of any such office. Accordingly, subordinate executive officers created by statute derive all their constitutional power from that afforded the President. The executive power exercised by all such officers flows from the President's power, to be performed in strict conformity with his direction. "If the execution of the laws is lodged by the Constitution in the President, that execution may not be divided upon into segments, some of which courts may control and some of which the President's delegate may control. It is all the law enforcement power and it all belongs to the Executive." Nathan v. Smith, 737 F.2d 1069, 1079 (D.C. Cir. 1984) (Bork, J. concurring).

The presidential monopoly on the executive power has received clear recognition from the Supreme Court. The Court has also concluded that the power to remove is an essential component of the President's control over execution of the laws. See Myers v. United States, 272 U.S. 52 (1926). Just last Term in Bowsher v. Synar, 106 S. Ct. 3181 (1986), the Supreme Court reaffirmed that the authority to remove an officer constitutes an essential component of the power to direct and control that officer. Id. at 3188. Relying on Myers, the Court struck down a statute vesting executive authority in the Comptroller General on the ground that he could be removed only by a joint congressional resolution or by impeachment. Bowsher, therefore, is a clear recapitulation of the longstanding principle that the President must have exclusive authority to remove those charged with executing the laws on his behalf.

Our conclusion on the constitutional permissibility of restricting the President's removal power over executive officials does not depend on whether the independent counsel is considered an "inferior officer" under the Constitution. While the Supreme Court has in dictum suggested that Congress may place some restrictions on the terms of removal of "inferior officers," *Myers* v. *United States*, 272 U.S. at 160; *United States* v. *Perkins*, 116 U.S. 483, 485 (1886), nothing in the caselaw or Constitution suggests that any such restrictions could be such as would hamper the President in his explicit constitutional prerogative and obligation to execute the law. Accordingly, a "good cause" restriction on the President's power to remove an independent counsel would be constitutional only if understood within this basic analytical framework.

QUESTION FROM SENATOR HEFLIN

Question: The 1988 Department of Justice authorization bill provides for the establishment of the Marshals Service as a bureau within the Department of Justice and modifies the powers and duties of United States Marshals. Why is it necessary to create a new bureau within the Department of Justice to oversee the activities of the United States Marshals?

Answer: The United States Marshals Service (USMS) was actually made a separate unit of the Department of Justice in 1973 by order of the Attorney General.[1] The USMS Act would incorporate the substance of that order and the regulations promulgated under it, as well as some 13 existing provisions of the United States Code. The Act would thus codify the establishment of the Marshals Service and consolidate the existing statutory authority for its organizational structure and responsibilities. It is a means of providing for the efficient operation of a nation-wide law enforcement agency which, like the other Federal government agencies, requires uniform, centralized policy guidance and management.

QUESTION FROM SENATOR HEFLIN

Question: The proposed legislation states that U.S. Marshals may, at the discretion of the respective courts and in accordance with the policies established by the Attorney General, be required to attend any session of court. Does this mean that judges possess the final authority? What if a judicial officer's concern for security conflicts with the policies established by the Attorney General?

Answer: As redrafted for introduction as a separate bill in the 100th Congress, the United States Marshals Service Act will retain the current language of 28 U.S.C. section 569(a), which provides that marshals "may, in the discretion of the respective courts, be required to attend any session of court."

QUESTION FROM SENATOR HEFLIN

Question: The proposed legislation authorizes the execution of writs, process and orders, "except as otherwise provided by law or rule of procedure." What does this "rule of procedure" mean? Does this allow the director of the proposed bureau or the Attorney General to adopt policies for the execution of writs? If so, why is this necessary?

Answer: In the context cited by the question, the term "rule of procedure" means a rule of either the Federal Rules of Civil Procedure (Title 28, U.S. Code) or the Federal Rules of Criminal Procedure (Title 18, U.S. Code), the provisions of which cannot be altered by either the Director of the Marshals Service or the Attorney General.

From Senator Heflin

Question:

8. The Justice Department has indicated its belief that the need for federal product liability legislation stems from the need to protect the flow of interstate commerce from state liability doctrines that jeopardize such flow, threaten the viability of productive American enterprise, harm consumers by raising the price of goods and removing desired products from the marketplace. Richard Willard, the Assistant Attorney General for the Civil Division of the Justice Department, at a hearing on September 9, 1986, before the Judiciary Committee stated: ". . . it seems obvious to us that any federal legislation should be directed only at those liability schemes that present such a threat, and should not preempt state law that does not burden commerce. The justification for federal preemption of the commerce clause of the Constitution is reserved for those situations where federal legislation is needed to promote the free flow of interstate commerce, not to further obstruct it." Would you comment on this statement and the position of the Justice Department concerning preemption of state rights in the area of tort reform?

Answer:

The Department's position that federal product liability legislation is both justified and necessary is based upon the undeniable fact that the United States has become a nationwide market for product manufacturers. Advancements in technology, transportation, and marketing have provided expanded opportunities to small and medium sized businesses that, in the past, were beyond their economic reach. This is a very positive development. It benefits consumers as well as manufacturers. Indeed, without the availability of a nationwide market, many manufacturers simply could not achieve the necessary economies which make their businesses profitable.

Unpredictable and unreasonable theories of liability associated with product-related injuries constitute a serious burden upon the free flow of products in interstate commerce. Manufacturers are faced with having to design, construct, and market their products in consideration of a patchwork of 50 state liability laws. In effect, this means that the state whose standard of liability is the most liberal may well dictate how or where a particular product is placed in the stream of commerce. This in itself places a burden upon interstate commerce. As a further result, if a manufacturer can still afford to manufacture and market his product--and many cannot--consumers in states with less liberal liability standards end up subsidizing injured persons in more liberal states. Not only does this turn the principle of federalism on its head, but it is grossly unfair, because injured persons in less liberal states may not be able to take advantage of the liberal standard of liability they have subsidized.

Despite the best intentions of many state legislatures, they are simply not capable of fixing this problem. Unable to determine how persons outside their boundaries are compensated for product-related injuries, states are left with the equally unpalatable alternative of liberalizing their own standards in retaliation, so that, at a minimum, their citizens are not discriminated against by the system. What eventually results is a downward spiral toward absolute liability. Product manufacturers will, in effect, become insurers for every injury associated with their product. This consequence would be an unnecessary burden on the economy, and is otherwise not desirable from a policy standpoint.

Federal reform is the only solution to the problem of nationwide market liability. This does not mean, however, that the nation's entire tort system should be federalized. Federalism still requires that when federal preemption of state law is justified, it take the least intrusive form possible, consistent with achieving the desired goal. In the area of product liability, we believe that the goal of a uniform, fair and predictable system of compensating persons who suffer product-related injuries can be achieved by federal legislation which establishes a national, fault-based standard of liability. This legislation should not only determine when manufacturers may be held liable for injuries associated with their products, but also the degree of that liability. In other words, federal legislation should also address issues like the doctrine of joint and several liability, recovery for non-economic loss, and the collateral source rule.

Consistent with the above stated goal, however, federal product liability legislation need not, and should not preempt more stringent state liability standards. Nor is there any need or desire to create a federal cause of action for product-related injuries. Finally, federal product liability legislation should not create a new basis for federal court jurisdiction over tort suits.

Question from Senator Howell Heflin

QUESTION: The Department of Justice budget for Fiscal 1988 allocated $2.7 million for the National Institute of Justice for drug-related research projects and public service announcements aimed at drug education and prevention. Will any of this money be available to states for state programs on education?

ANSWER: The funds requested by NIJ for drug-related research projects and public service announcements aimed at education and prevention will not be given specifically to the states but will be used to establish a local and regional drug use index helpful to judges in assessing the danger to the community posed by arrestees testing positive for illicit drugs if released on bail; for evaluation of how street dealer crackdowns can be undertaken most effectively, and for a nationwide drug prevention public service announcement campaign to reduce the use of drugs. While these efforts will directly provide research beneficial to state and local governments, the funds will not be apportioned to the states as are Bureau of Justice Assistance or Juvenile Justice monies.

The $2.7 million would fund 3 initiatives. First, $1,350,000 would be spent in FY 88 to add 15 cities to the Drug Use Forecasting (DUF) system being pilot tested in 10 cities in FY 87. DUF tests the urine of randomly selected arrestees for illicit drugs. Findings from the testing would, for the first time: establish a local and regional drug use index, give judges information about the extent of arrestees' drug use to help in assessing the arrestees' danger to the community if released on bail, and allow quick notice of changes in regional drug use to be given to law enforcement, treatment facilities, and the Drug Enforcement Administration.

Second, $600,000 would be used to replicate a previous NIJ study which suggested that targeted police interruption and enforcement against street dealers might have a deterrent effect as well as disrupt street information on where to make buys. The replication would be undertaken in 8 cities. The funds requested by NIJ will be used to implement and then evaluate how street dealer crackdowns can be undertaken most effectively.

Finally, $750,000 would fund a research-based public service announcement drug prevention campaign directed toward children and teenagers, groups particularly vulnerable to drug use. These announcements would be action oriented versus testimonials and would be developed by professional advertising personnel and would follow NIJ's recent successful "Report, Identify, Testify" campaign. The success was boosted by local involvement and partnership with the private sector, as when businesses donated billboards and displayed posters and flyers in local shops. On behalf of the National Institute of Justice, the National Sheriffs Association has disseminated the "Report, Identify, Testify" public service videotape to 308 sheriffs in 34 states to use for presentations to school groups, community groups and civic organizations. To date, commercial-quality videotapes have been loaned to 27 counties for airing on local television stations. The attached article from "The National Sheriff", describes the tremendous exposure NIJ's public service announcements have received thus far. The National Institute of Justice anticipates the PSA drug prevention campaign to have a similar if not greater impact.

REPORT · IDENTIFY · TESTIFY

CAMDEN COUNTY

Successfully Develops Community Crime Fighters

Susan P. Keegan

Camden County, N.J., Sheriff William Simon recently launched a unique campaign to increase citizen participation in the criminal justice system.

Sheriff Simon's efforts began when he contacted the National Sheriffs' Association (NSA) and requested copies of the Public Service Announcement (PSA)—Report, Identify, Testify. NSA is distributing the PSAs through a grant from the National Institute of Justice (NIJ). The four PSAs, produced by the NIJ with assistance from Procter & Gamble, provide a compelling message for citizen involvement in the war on crime.

One PSA incorporates a courtroom scene, showing an empty witness chair, along with the message "Crime can happen without you, but justice can't." Another PSA features a group of juvenile delinquents, stealing an automobile, thanking the public for not reporting them or their crime sprees.

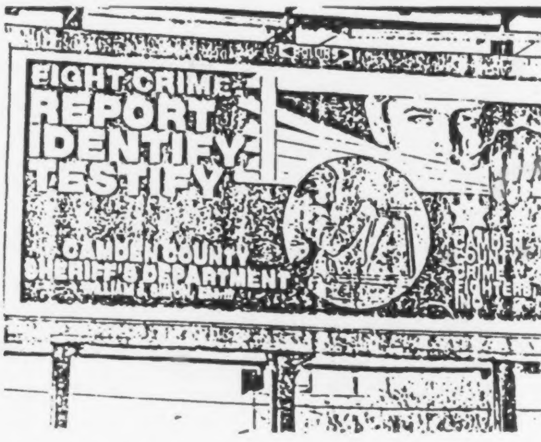
After seeing the PSAs, Sheriff Simon and his staff were convinced they could influence people to get involved in fighting crime through widespread distribution of the PSA message. They wanted to expand upon them, so the Sheriff and his staff founded a non-profit corporation which allowed them to receive donations. The Camden County Crimefighters Inc. was formed by three of the Sheriff's staff: George Fallon, President; Curtis Chumento, Treasurer; and Frank Schillig, Secretary.

First, the organization approached the major television networks in the Delaware Valley about airing the PSAs. The stations agreed to show the PSAs during October—crime prevention month.

The Camden County Sheriff's Department then sought to expand its media coverage by developing billboards, posters, litterbags, pocket calendars and flyers. Through generous donations from local businesses, 15 billboards in the county were used to display the "Report, Identify, Testify" message during the month-long campaign.

Reinforcing this message was the distribution of more than 1,000 posters and flyers that were displayed in local shops and businesses as well as given out at meetings.

More than 15 billboards were used throughout Camden County, NJ.



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DESCRIPTION FOR BRASS PLATE [illegible]

PINELLAS COUNTY FLORIDA
SHERIFF'S OFFICE

Rapidly growing Sun Coast County of 831,000 residents covering 280 square miles and seated in Clearwater. Exceptional quality of life provided within a reasonable cost-of-living. Nationally respected full service sheriff's office involved in a wide variety of law enforcement, judicial and corrections activities. 135[illegible] employees, $50-million budget. Position report directly to highly professional and popular elected Sheriff.

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DIRECTOR OF POLICY COMPLIANCE—Responsible to manage the Policy Compliance Division. Division responsibilities are internal investigations, staff and line inspections and policy and general order development, prefer college degree(s) and significant, increasingly responsible professional experience, preferably in law enforcement, including investigation and management experience, skilled analytical ability, highly ethical and honest.

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MERCER/SLAVIN, INC.
Tarzana Financial Center
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(818) 345 7100

Camden County Sheriff William Simon recognized the efforts of the Glendale National Bank of New Jersey represented by Diane Strong, Vice President.

A local paint company also pitched in to help spread the "Report, Identify, Testify" message by printing the logo on 1,000 painters caps to be distributed by the shop.

A car wash in New Jersey donated and distributed more than 10,000 litterbags decorated with the logo.

To show his appreciation, Sheriff Simon and the Crimefighters Inc. honored the businessmen who contributed to the success of the campaign. More than a dozen local business people had contributed over $5,000 to support the effort. The sheriff awarded each a plaque inscribed with the PSA logo, "Report, Identify, Testify." (The plaques were even donated by the Police Benevolent Association.)

Numerous plans to increase public awareness are underway. "This program has only just begun," Sheriff Simon says. "We will continue to seek business involvement to arouse public interest in the battle against crime. We have had such success in only a few months . . . . I can't begin to imagine what the future holds."

NSA is anxious to send your department a copy of the PSAs [illegible] you develop a "Report, Identify, Testify" campaign. For more information, contact Susan [illegible] Keegan, [illegible]ect Director, NSA, [illegible] Alexandria, VA 22[illegible] [illegible] 7827 or (800) [illegible]

Question from Senator Heflin.

If the problem the Department of Justice has with the Regional Information Sharing system (RISS) programs concerns the fact they are not self-funded, is the answer to eliminate all funding from the programs? Is it not possible to require the local agencies receiving information to bear some of the financial burden, but not the entire burden?

Answer:

The original RISS projects were funded by the Department of Justice in the mid-1970's on a demonstration basis with the expectation that financial support for these intelligence networks would, in time, be assumed by the state and local law enforcement agencies which they serve. RISS projects have now grown to seven in number and consume approximately $12 million per year in scarce Federal law enforcement funds. Since 1975, when the first project was funded, the Federal Government has appropriated over $74,000,000 for these projects. RISS projects are the only state and local law enforcement activities funded almost entirely by the United States Government.

Since the Carter Administration, this Department has urged that Federal funding of RISS projects be phased out. Each year, however, the Congress has continued the funding of RISS projects through appropriation acts. In the meantime, the RISS projects have undertaken no significant action toward securing a system of self-funding through contributions from the state and local law enforcement agencies which use their services. By the end of 1987, it is anticipated that the projects will still only be contributing in non-Federal funds less than ten percent of the total funding.

Question from Senator Howell Heflin

QUESTION: I plan to reintroduce legislation which would establish an independent corps of Administrative Law Judges. The basic purpose of the unified corps is to give Administrative Law Judges greater independence from the agencies over whose proceedings they preside. Would you comment on the Administration's views on this proposal?

ANSWER: The Department would oppose legislation establishing an independent corps of administrative law judges (ALJs). We believe that the current structure of administrative adjudication adequately safeguards the impartiality of ALJs and that there is no evidence that the establishment of an ALJ corps would significantly improve the efficiency of administrative adjudication, if at all. Because ALJs would not specialize in the work of any particular agency under the proposal, we think that it would result in a substantial loss of adjudicative expertise at the ALJ level. Moreover, there would be a serious diminution of agency flexibility and accountability. We would be pleased to testify or provide a bill report on your bill, elaborating upon our concerns and our objections to the concept of an independent ALJ corps.

Question from Senator Howell Heflin

QUESTION: There have been several legislative proposals to respond to the problems facing the federal judiciary. These proposals include the creation of the Intercircuit Panel, the creation of the Federal Courts Study Commission, the elimination of the Supreme Court's Mandatory Jurisdiction and the possibility of establishing a new position of Chancellor of the United States to help with the administrative duties of the Chief Justice. Would you please comment on the Administration's views on these proposals?

ANSWER: The Administration's views regarding the proposed Intercircuit Panel, the elimination of the Supreme Court's mandatory jurisdiction, and other legislative efforts to address the current workload crisis faced by the federal courts have been set forth in written testimony submitted on February 25, 1987, by Assistant Attorney General Stephen J. Markman (Office of Legal Policy) to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, and on October 9, 1985, by his predecessor Assistant Attorney General James M. Spears to the Subcommittee on Courts of the Senate Judiciary Committee. Copies of these statements are attached.

We have endorsed a broad range of court reform measures to confront the fundamental causes of the growth of the federal caseload, including reforms relating to habeas corpus petitions, diversity jurisdiction, and the Supreme Court's mandatory jurisdiction. The Department has also supported the creation of a Federal Courts Study Commission and a Chancellor of the United States in the past.

It is our intention to work with Congress to develop a consensus court reform package that can achieve enactment in this Congress.

Department of Justice

STATEMENT

OF

STEPHEN J. MARKMAN
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

RESPONSIBILITIES OF THE OFFICE OF LEGAL POLICY
OF THE DEPARTMENT OF JUSTICE

ON

FEBRUARY 25, 1987

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today to outline briefly the activities of the office which I head in the Department of Justice, the Office of Legal Policy.

The Office of Legal Policy (OLP) was created by Attorney General Order on May 26, 1981, to serve as the principal policy staff reporting to the Attorney General and Deputy Attorney General. The Office incorporates the functions of the former Office of Improvements in the Administration of Justice, which focused on court reform initiatives, such as the proposal that led to the Federal Courts Improvement Act of 1982. The Office of Legal Policy continues to perform that role, but includes wider areas of responsibility.

In essence, OLP is a strategic legal "think tank" that serves as the Attorney General's principal policy development staff. Responding to specific requests by the Attorney General as well as initiating its own proposals, OLP provides the thorough legal analysis necessary to develop and implement the Department's long-term policy objectives. When appropriate, the Office also coordinates and reviews the policy positions advanced by other component organizations of the Department to ensure that a coherent policy consistent with the overall goals of the Attorney General and the Administration exists. In carrying out its responsibilities, OLP is authorized to call upon the relevant Departmental units for personnel and other assistance.

I. POLICY DEVELOPMENT

Since its creation in May 1981, one of OLP's principal responsibilities has been to develop concrete strategies for legal reform. The breadth of our activities is not easy to capture in a short list, as our energies have been devoted over the years to a wide variety of subjects of interest to the Department of Justice. Moreover, OLP's emphasis on particular subjects has shifted over time in reflection of the major issues of the day and our judgment as to where our resources can most usefully be placed. Finally, the nature of OLP's policy development work means that much of our work product is prepared in a deliberative and advisory capacity and so is not suitable for public release. I will try, however, to give the Subcommittee some understanding of the subjects of our attention in recent years.

Some of OLP's work product has already been made public, and we anticipate further efforts to stimulate public discussion by releasing additional policy recommendations in the future.

For example, OLP's "Truth in Criminal Justice Project" seeks to identify features of contemporary criminal procedure that unduly hinder the search for truth in criminal prosecutions. One of those reports, on the Law of Pre-Trial Interrogation, recently was released to the public, and we anticipate that additional reports will be made available in the future.

OLP has also prepared for public release a sourcebook of relevant materials and questions and answers on the subject of interpreting the Constitution according to its original meaning.

With respect to other OLP initiatives, which are not suitable for public release at this time, I can at least provide a brief outline of some of the subject we have been working on.

The Office is in the process of formulating principles to be followed by federal government litigators when various constitutional issues arise at trial. Consistent with the Attorney General's call for interpretation of the Constitution according to its original meaning, OLP has analyzed the original meaning of various constitutional provisions and proposed analytical frameworks for resolving contemporary issues relating to these provisions.

Other topics of current OLP projects relating to legal policy include a consideration of religious liberty principles, and an analysis of the constitutional provisions relating to the protection of economic rights, and the related caselaw and scholarship. Past OLP projects include (1) coordinating the Department's response to the American Law Institute's proposed Restatement of the Foreign Relations Law of the United States (Revised), adopted in June 1986; (2) assisting in the development of the Department's position regarding reform of the civil damages provisions of the Racketeer Influenced and Corrupt Organizations Act; and (3) analyzing certain legal issues relating to immigration, efforts that contributed to the passage of the new immigration reform bill by the 99th Congress.

On many projects, OLP works closely with other Department components and federal agencies. For example, OLP provides legal analysis and litigation recommendations to the Solicitor General and the Department's legal divisions in selected cases presenting major issues. My Office devotes a substantial amount of time working with the Office of Legislative Affairs and other components of the Department to develop legislative positions on pending legislation, and to review and provide advice with respect to enrolled bills. OLP devoted substantial effort to obtain enactment of the Bankruptcy Reform and Federal Judgeship Act of 1984 and the United States Trustees Act in 1986. OLP chaired an intra-departmental task force that revised and distributed a policy guide regarding the award of attorneys' fees under the Equal Access to Justice Act. The Office has also participated on inter-agency working groups regarding international law issues.

Court Reform

An important subset of OLP's policy development responsibilities is the study and advancement of court reform. This Subcommittee commendably has done a great deal over the years on various legislative initiatives on this general subject. Because of the Subcommittee's particular interest in this subject, I will discuss our efforts at some length. Although we may not agree on all issues relating to court reform, I believe that the Department and the Subcommittee have much common ground. We will be pleased to work with you in this Congress.

The Office has devoted and will continue to devote a substantial amount of its resources to court reform legislation. It has primary responsibility for legislative proposals and other general proposals affecting the operation of the courts and the administration of justice. We have, for example, worked with this Subcommittee on proposals concerning mandatory appeals to the Supreme Court, civil priorities and expediting provisions, jury service amendments, and abolition of diversity jurisdiction.

In a recent speech before the American Bar Association, Justice Antonin Scalia warned of the serious workload crisis faced by our federal judiciary. He noted that, since 1960, there has been a staggering fourfold increase in the number of civil suits filed each year in federal courts, and a ninefold increase in the number of appeals prosecuted. And he perceptively concluded that, unless major structural reforms are instituted, the quality of the judiciary will inevitably suffer. In his words, our federal judiciary "is fast becoming . . . a vast judicial bureaucracy, and it will inevitably acquire personnel to match."

The Office of Legal Policy has long been concerned about the problems identified by Justice Scalia, and his assessment of the federal litigation explosion and its potential effect on the quality of the federal judiciary deserves to be taken seriously. My predecessor James M. Spears presented lengthy testimony to the Subcommittee on Courts of the Senate Judiciary Committee on the same subject on October 9, 1985. As he noted then, filings in the district courts and the courts of appeals had increased by half in just the five years before 1985.

Clearly, something must be done to address these critical concerns.

Justice Scalia's proposal to address this burgeoning federal court caseload is to establish specialized courts to handle certain kinds of cases -- such as social security disability cases. We agree that this alternative of specialized courts warrants some consideration, although we also note that there are disadvantages to such specialization, which would change the character of the federal judiciary. Because of these competing considerations, which divide well-meaning people, Congress has been reluctant to embrace specialization to the degree that some of the states have.

It is increasingly clear, however, that the federal court overload cannot be effectively addressed by merely appointing more judges. The creation of additional layers of judicial review, such as an intercircuit tribunal to resolve conflicts among the federal appellate courts, may offer limited relief but will not be sufficient, standing alone, to significantly alleviate the workload crisis. The Department has voiced conditional support for such a proposal, though we recognize that the final details for such a tribunal have yet to be agreed upon, as was indicated by the amendments adopted last year by the Senate Judiciary Committee. Moreover, we recognize that such proposals are, to a degree, stop-gap measures that address only a symptom and not the cause of the overburdened federal docket. More fundamentally, Congress must act to reduce and stabilize the number of cases reaching the federal courts.

Many cases contributing to our overcrowded federal dockets are brought pursuant to some federal statute -- as it has been applied and interpreted by the courts. It is incumbent upon Congress to periodically review these statutes and the court decisions construing them to see if their original purposes are being fulfilled. When Congress passes a statute, it does so in the context of the existing body of laws and practices. However, over time those circumstances inevitably change as underlying legal principles evolve and as other statutes are passed. The net effect, over time, may be that a statute develops a breadth or application that is beyond or different from what Congress originally intended. Accordingly, Congress must remain aware of how this process is working and must be ready to amend these statutes when necessary. We believe that the existing federal court crisis is in part predicated on statutes that over the years have been transformed into new rights and causes of action, and that now bear little, if any, resemblance to original congressional intent or traditional causes of action.

The growth of prisoner litigation provides a good example. Not only are prisoner petitions typically frivolous (state prisoner habeas corpus petitions result in some form of relief in only about 3% of the cases, and actual release from prison in far fewer cases), 1/ but they are also largely

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1/ See P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 13-15, 23-24 (Dept. of Justice 1979).

unaffected by the normal disincentives to litigation. The expense of attorneys' fees and other costs -- a significant deterrent to frivolous suits in most other areas -- is largely absent, since most prisoners sue pro se and qualify for in forma pauperis status. Since litigation appeals to many prisoners as a legitimized form of aggression against the system and a means of relieving boredom, the normal disincentive of the stress and unpleasantness of litigation is also largely inapplicable.

Congress never authorized this flood of prisoner litigation; its growth is primarily attributable to judicial decisions. The legal basis for such suits was provided primarily in the 1950's, 1960's and 1970's when the Supreme Court expanded the federal causes of action contained in surviving provisions of Reconstruction-era legislation. This is true for suits under 42 U.S.C. § 1983 as well as federal habeas corpus petitions by state prisoners, which together account for the bulk of prisoner litigation.

Under current law, a state prisoner who has exhausted state remedies may re-open his case in federal district court by applying for a writ of habeas corpus. This quasi-appellate jurisdiction of the lower federal courts over state criminal judgments has traditionally been the greatest source of friction between the federal and state judiciaries. State judges are naturally resentful of a system that allows a single federal trial judge to review and overturn the considered judgments of state appellate and supreme courts. Federal judges have expressed equally serious concerns over the thousands of frivolous petitions that are filed by state prisoners each year. The practical effect of the system is that a criminal judgment in the United States is never truly final, but is potentially subject to endless re-litigation in federal habeas corpus proceedings. OLP will continue to work toward habeas corpus reform by advocating legislation that sets appropriate time limits for application, imposes a more stringent standard of review for claims already adjudicated by state courts, and tighter rules for consideration of claims not previously waived.

The tremendous growth in the number of actions under 42 U.S.C. § 1983 -- in both the non-prisoner and prisoner contexts -- also demands scrutiny and reform. Section 1983 was enacted in 1871 as a direct response to the rise of Ku Klux Klan terrorism in the South during Reconstruction, and the general unwillingness or inability of the governments in the former Confederate States to enforce the Reconstruction-era Amendments and their implementing legislation in the face of this pervasive disorder. Originally intended as a narrow civil remedy, Section 1983 has ballooned in the last two decades into a major source of federal court litigation, with a scope far beyond anything Congress contemplated in 1871. The 1,581 pages of annotations under 42 U.S.C.A. § 1983 (1981 and 1986 Supp.) reflect the enormous range of state and local activity that is now the subject of litigation under Section 1983.

This Office will continue to devise and advocate reforms required to reduce to large number of spurious claims now brought under Section 1983. Such reforms might include the elimination of Section 1983 as a basis for prisoner petitions and for claims unrelated to civil rights or equal protection, the provision of a good-faith defense for municipalities, the restriction of punitive damages to egregious cases, a requirement that state administrative and judicial remedies be exhausted, and an attorneys' fee cap.

Limiting federal diversity jurisdiction would be another effective means of relieving the federal caseload problem. In recent years, diversity cases have generally accounted for about 25 percent of all civil filings, 40 percent of all civil trials, and 60 percent of all civil jury trials in the federal courts. The magnitude of the diversity caseload affects appellate courts as well: about 15 percent of all appeals of district court decisions arise in diversity cases.

Mr. Chairman, I want to acknowledge your leadership in proposing reforms to diversity jurisdiction. While we agree with you that diversity jurisdiction should be limited, you have suggested a number of other reforms short of abolition that should also be considered. For example, the historical concerns over bias by state judges and jurors against persons from other states cannot in any way justify allowing in-state plaintiffs the choice of a federal forum. The current $10,000 minimum amount in controversy was adopted to ensure that minor cases would not find their way into federal court. That minimum, however, was adopted in 1958 and inflation over the past 29 years has gradually lowered the effective threshold by more than 70%. Finally, whole classes of cases, such as automobile accident cases, are the kinds of cases that state court systems have been able to handle without any evidence of bias or unfairness. Those cases should be totally eliminated from the federal docket, just as we now exclude other significant classes of state cases -- such as domestic relations cases -- from federal diversity jurisdiction. The Department provided this Subcommittee with a statement of its position on these various diversity jurisdiction reforms in the 98th Congress, and we would be pleased to work with you in this Congress to further our mutual goal.

Another area of potential court reform concerns mandatory appeals to the Supreme Court. While the Supreme Court's review jurisdiction has become predominantly discretionary over the past century, statutes remain that require the Court to review any case within broadly defined mandatory appeal categories. The Department of Justice has supported legislation that would make the Court's docket generally discretionary, except for direct appeals from three-judge district court panels. 2/ Although many cases now the subject of mandatory appeals, particularly cases holding federal or major state laws unconstitutional, should be considered by the Supreme Court, many other mandatory appeals do not raise issues of great intrinsic importance and would not merit review if presented as petitions for certiorari.

Another innovation in court adjudication that we have been considering is court-annexed arbitration. As you know, Mr.

2/ See, e.g., Letter of Assistant Attorney General Robert A. McConnell to Honorable Peter W. Rodino Concerning H.R. 1968 (September 13, 1983).

Chairman, several districts have adopted experimental rules for arbitration of certain civil cases. The Department of Justice adopted a policy statement on such arbitration systems on August 21, 1985. I know of your interest in enacting legislation on this subject, and offer our cooperation as you consider legislation this Congress.

We will also be pleased to work with the Subcommittee as you consider revisions to the Rules Enabling Act. We want to be responsive to the practical questions, in order to make the procedures as workable as possible, as well as legally sound.

In sum, OLP will continue to address the root causes of the enormous growth of the federal court caseload by analyzing and recommending a broad-based set of court reforms.

II. JUDICIAL SELECTION

OLP has also worked to identify qualified candidates for appointment to the federal courts. Working with other Department components and White House officials, OLP has been instrumental in filling new judgeships created by the Bankruptcy Amendments and Federal Judgeship Act of 1984 as well as vacancies in existing judgeships. To date, the Office has assisted in the appointment of 299 federal judges, and has interviewed hundreds of additional candidates as vacancies arose.

III. FREEDOM OF INFORMATION

The Office of Legal Policy is charged with principal responsibility within the Department of Justice for implementation of the Freedom of Information Act (FOIA). Our consistent legislative efforts since 1981 led recently to the enactment of important reforms to the law enforcement provisions of the Act, as well as revisions with respect to fees, as part of the Anti-Drug Abuse Act of 1986.

My Office provides policy guidance and supervision, while a separate office, the Office of Information and Privacy (OIP), which reports to OLP, manages and coordinates day-to-day responsibilities related to the FOIA and the Privacy Act. OIP's primary responsibility is to adjudicate appeals, on behalf of the Attorney General, from initial denials by Department units under the FOIA and Privacy Act. This office also advises executive agencies and organizational units of the Department on questions relating to interpretation and application of the FOIA.

IV. OTHER ONGOING RESPONSIBILITIES

In addition to its foregoing principal responsibilities, OLP administers the Federal Justice Research Program. This is a departmental program that supports, through grants and contracts, empirical and analytic research on court reform issues and other topics of special concern to the administration of justice. Although the FJRP has received no additional funding from Congress since Fiscal Year 1984, the program has been able to provide limited funding for projects from its remaining unobligated funds. Those projects include the annual Conference on the Administration of Justice, a study on peremptory challenges of judges in certain state courts, and various dispute resolution initiatives.

OLP also has the responsibility for supporting the Attorney General in his role as permanent chairman of the Federal

Legal Council. The Federal Legal Council was created to promote coordination and communication among federal legal offices with the goal of achieving effective, consistent, and efficient management of legal resources throughout the federal government.

The foregoing is a brief description of some of the functions of the Office I head. I have emphasized the court-related functions with which I believe this Subcommittee would be most concerned.

With respect to the requested Fiscal Year 1988 budget for OLP, our requested authorized positions and work years remain unchanged from the present fiscal year (and indeed have remained constant for many years). The amount requested for Fiscal Year 1988 reflects increases in uncontrollable expenses, and an additional amount to cover the costs of implementing AMICUS, the Department's uniform office automation system.

I am pleased, of course, to respond to any questions you or members of the Subcommittee may have.

Department of Justice

STATEMENT

OF

JAMES M. SPEARS
ACTING ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

SUBCOMMITTEE ON COURTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE INTERCIRCUIT PANEL

ON

OCTOBER 9, 1985

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear today on behalf of the Administration to discuss the nature and causes of the workload crisis now faced by the federal courts, and possible solutions to that problem, including the Intercircuit Panel proposed by S. 704.

My testimony will first briefly address the background and purpose of the Intercircuit Panel proposal. I will then attempt to place that proposal in its broader context by discussing the fundamental causes of the rising federal court caseload and suggesting some legislative court reform proposals that Congress should consider to reduce the caseload. I will conclude by returning to the Intercircuit Panel proposal and setting forth the Administration's position on the need to approach court reform issues on a coordinated basis, rather than focusing exclusively on a structural change like the Panel proposal without addressing the underlying causes of the court overload.

I. THE INTERCIRCUIT PANEL PROPOSAL

A. The Supreme Court's Workload

You are to be commended, Mr. Chairman, for holding these hearings to explore the dimensions of the workload problem in the Supreme Court. Over the past few years, there has been a significant increase in the number of cases argued before the Supreme Court -- increasing in five years from 156 in the 1979

Term to 164 in the 1983 Term. 1/ Superficially, it might appear that the Justices should bear some responsibility for this increase, since the Court has discretion to grant or deny certiorari with respect to over three-fourths of the cases accepted for argument. However, the growth of the caseload in the federal court system as a whole makes it clear that the Supreme Court's exercise of its certiorari jurisdiction is not the essential problem.

The volume of litigation in the Supreme Court is dependent to a large degree on the number of potentially appealable decisions rendered in the lower courts. In the 1983 Term, for example, about 4,200 new cases were filed in the Supreme Court, in comparison with about 4,000 in the 1979 Term and 3,400 in the 1970 Term. While this increase in the Supreme Court's docket is significant, it actually greatly understates the dramatic increase in federal court caseloads in recent years.

1/ Statistics in this statement on the Supreme Court are taken from the annual reports of the Solicitor General's office, which are published as part of the Annual Report of the Attorney General. Year numbers refer to the terms of the Supreme Court, which normally run, for statistical purposes, from July of one year to July of the next; for example, the 1984 Term ran from July 6, 1984 to July 1, 1985. The statistics on inferior court caseloads are taken from the Annual Reports of the Director of the Administrative Office of the U.S. Courts. Year numbers refer to the Administrative Office's reporting years, which end on June 30; for example, reporting year 1985 covers the twelve-month period ending June 30, 1985. Since the most recent Adminstrative Office Annual Report is for reporting year 1984, the statistics cited in this statement are for that year for the lower federal courts and for the corresponding 1983 Term for the Supreme Court.

Between 1980 and 1984, for example, filings in the district courts rose from 198,000 to 298,000. 2/ During that same time frame, filings in the courts of appeals rose from 23,000 to 33,000. Thus, in just five years we have seen the number of district and circuit court filings increase by 51% and 44%, respectively.

B. S. 704

S. 704 would seek to reduce the Supreme Court workload by creating a temporary Intercircuit Panel of the United States Courts of Appeals, a special court or panel of active and senior circuit judges to render nationally binding decisions in cases referred to it by the Supreme Court. There would be a regular panel of nine judges, plus four "alternates" who would substitute for regular panel members who were disqualified or absent in particular cases. The Supreme Court would choose judges for service on the Panel for three-year terms, with some variation in the length of the initial terms to create staggered terms of service. The Panel would remain in existence until it had disposed of all cases pending on the date five years after the date of the first referral of a case to the Panel by the Supreme Court. It would then automatically go out of existence, unless continued by new legislation.

Proponents of the Intercircuit Panel proposal have argued that creation of the Panel would free the Supreme Court to

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2/ Civil cases represent the great majority of district court cases: 261,000 (88%) out of the 298,000 filings in 1984.

devote more of its time to the most important statutory and constitutional cases, thereby helping to ensure adequate time for reflection and deliberation on the Court's most critical decisions. The Panel could serve particularly well by resolving intercircuit conflicts in the interpretation of statutes.

Creation of an Intercircuit Panel would also arguably enhance the Supreme Court's ability to supervise the lower courts. As a result of the astronomical growth in the volume of federal appellate litigation in recent years -- again, court of appeals filings rose 44% just between 1980 and 1984 -- the Supreme Court is able to review an increasingly small fraction of circuit court decisions. This tends to cast the circuit courts in the role of de facto supreme courts on many matters for the areas of the country they serve, and circuit judges may be encouraged to press beyond Supreme Court precedent in the knowledge that the likelihood of further review is very slight in most cases they decide.

The Panel opponents' principal criticisms are that (a) the Panel would address only a symptom and not the cause of the explosion in the number of federal cases, (b) the Court's current workload is not excessive and the Court already has sufficient tools to control its workload, (c) a surrogate nation-wide appellate authority is inadvisable because it would allow the Supreme Court to devote too much of its time to constitutional questions and thus "over-constitutionalize" the law, and (d) despite the bill's sunset provision, the Panel is not likely to be a temporary institution.

We see merit in the arguments of both the proponents and opponents. On balance, however, but for the following two substantial concerns, we could recommend that the Panel be established for the period proposed by S. 704 so that the debate over the Panel could be better informed.

Our first concern is with S. 704's provision for appointment of the Panel's membership by the Supreme Court. The President has, of course, traditionally appointed all federal judges, with the advice and consent of the Senate -- pursuant to Article II, Section 2 of the Constitution. S. 704 raises the substantial constitutional issue of whether membership on the Panel -- the second most important court in the country -- would constitute an office of the United States, to which one must be specifically appointed by the President with the Senate's approval. We do not think that question need be resolved here, however, because it is clear to us as a matter of constitutional policy that the Panel should be appointed by the President and confirmed by the Senate. That would preserve the traditional role of the executive and legislative branches in judicial appointments; and the unique stature and authority of the Panel especially warrant review of the selections by the political branches under the checks and balances structure of our Constitution.

Our second concern is broader and more fundamental. We have serious doubts about the wisdom of addressing the federal court overload by simply adding another court without first doing something about the underlying causes of that overload. The

Supreme Court workload is but one manifestation of the problems facing the federal courts. A clearer manifestation is that the case filings in the district courts have increased by 51% in just five years. Congress must draw its attention to where the 298,000 cases filed in 1984 come from and decide whether it will take action to control this flood of litigation. Unless Congress takes steps to reduce and stabilize the number of cases reaching the federal courts, the creation of an intercircuit tribunal or the establishment of new district and circuit court judgeships are, at best, stop-gap remedies which will ultimately fail. Accordingly, it is within this broader context of court reform that the Intercircuit Panel proposal must be considered.

II. THE NEED FOR FUNDAMENTAL COURT REFORM

A. General Causes

I would not presume to take this committee's time to give a complete analysis of the fundamental causes of the federal court overload -- nor would I claim the ability to do so. My principal message is that all three branches of the government should bring their attention and abilities to bear on identifying and responding to those fundamental problems. However, having examined the issue, we believe that there are some readily identifiable factors that have contributed to the explosion of federal litigation and there are some remedial steps that can be taken.

There are certainly many causes of the caseload crisis. While there can be no doubt that judicial decisions 3/ and legislation 4/ that encourage litigation have contributed, I wish

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3/ In recent times, the Supreme Court has been hospitable to constitutional arguments that address claims whose resolution has traditionally been the responsibility of the state judiciaries or the political process. The Court has contributed to the trend in which the role of judges is viewed less as one of interpreting the Constitution and statutes, guided principally by their text and the legislative intent of the Framers and Congress, and more as one of resolving public policy questions as guided by the perceived values of an enlightened society. This Administration has consistently challenged, and taken steps to reverse, this trend of moving from interpretivism to judicial activism. See generally Statement of Assistant Attorney General Jonathan C. Rose on the Workload of the Supreme Court Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (November 10, 1983).

4/ As the federal government has assumed a greater role in the economic and social life of the nation, the function and authority of the federal courts has also greatly expanded. The courts have been charged with the interpretation and implementation of a plethora of new statutes and regulations. In proposing and enacting many of these initiatives, particularly the economic regulatory statutes passed in the last two decades, both the Executive Branch and the Congress have unnecessarily encouraged litigation and have, in effect, left critical policy decisions for resolution by the courts.

If all federal statutes were precise and unambiguous, and judicial review of their implementation were properly circumscribed, the resulting role and workload of the courts would be less significant. Under many federal statutes, however, the substantive standards or standards of review (or both) are ambiguous or inconsistent. This thrusts the courts into a policy-making role and ensures that abundant opportunities for litigation will arise in the administration of the affected programs.

The adverse consequences of effectively delegating legislative functions to the courts through vague or open-ended statutes are frequently compounded by legislative decisions to delegate enforcement functions to unaccountable private interests. This tendency is reflected both in broad

(Footnote Continued

to suggest today a more direct way of approaching the court overload crisis. We should be asking ourselves: Where are the 298,000 annual district court filings coming from? Why has that annual number increased by 100,000 (51%) in just five years?

The general answer is that these cases are for the most part brought pursuant to some federal statute -- as it has been applied and interpreted by the courts. It is incumbent upon Congress to periodically review these statutes and the court decisions construing them to see if their original purposes are being fulfilled. When Congress passes a statute, it does so in the context of the existing body of laws and practices. However, over time those circumstances inevitably change as underlying legal principles evolve and as other statutes are passed. The net effect, over time, may be that a statute develops a breadth or application that is beyond or different from what Congress originally intended. Accordingly, Congress must remain aware of how this process is working and must be ready to amend these statutes when necessary. We believe that the existing federal court crisis is in part predicated on statutes that over the years have been transformed into new rights and causes of action, and that now bear little, if any, resemblance to original congressional intent or traditional causes of action.

(Footnote Continued)
statutory definitions of the classes of persons given standing to sue under regulatory statutes and in ever-broader statutory authorization of awards of attorneys' fees against the government. See generally Statement of Assistant Attorney General Jonathan C. Rose on the Workload of the Supreme Court Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (November 10, 1983).

B. *Prisoner Litigation*

The growth of prisoner litigation provides a good starting point. Thirty years ago, the number of suits brought by prisoners in the federal courts each year was about 1,300. Today, the annual figure is about 31,000 (11.9% of all civil cases), and the number continues to increase rapidly from year to year (a 34% increase just since 1980).

Prisoner petitions are exceptional among major categories of federal litigation. Not only are they typically frivolous (state prisoners' habeas corpus petitions, for example, result in some form of relief in only about 3% of the cases, and actual release from prison in far fewer cases), *5*/ but they are also largely unaffected by the normal disincentives to litigation. The expense of attorneys' fees and other costs -- a significant deterrent to frivolous suits in most other areas -- is largely absent, since most prisoners sue *pro se* and qualify for *in forma pauperis* status. Since litigation appeals to prisoners primarily as a legitimized form of aggression against the system and a means of relieving boredom, the normal disincentive of the stress and unpleasantness of litigation is also largely inapplicable.

Congress never authorized this flood of prisoner litigation; its growth is primarily attributable to judicial decisions. The legal basis for such suits was provided primarily

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5/ *See* P. Robinson, *An Empirical Study of Federal Habeas Corpus Review of State Court Judgments* 13-15, 23-24 (Dept. of Justice 1979).

in the 1950's, 1960's and 1970's when the Supreme Court expanded the federal causes of action contained in surviving fragments of Reconstruction-era legislation. This is true of both suits under 42 U.S.C. § 1983 and federal habeas corpus petitions by state prisoners, which together account for the bulk of prisoner litigation. The Supreme Court, as well as the lower courts, has suffered from the impact of this added caseload. In a recent term, 20 percent of the cases decided by the Court involved § 1983 and over 10 percent of all filings in the Court were state prisoner habeas corpus cases. 6/ I will first address possible reforms in habeas corpus.

C. *Habeas Corpus Reform*

Suits brought by state prisoners account for 10.2% of all civil cases in the federal courts. Of those prisoner suits, habeas corpus petitions represent a significant percentage: for

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6/ *See* Justice Sandra Day O'Connor, "Comments on the Supreme Court's Workload," Delivered Before a Joint Meeting of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, Louisiana, February 6, 1983, at 14 (20% of cases decided by Supreme Court in the 1981 term involved § 1983); Justice Lewis F. Powell, Address Before the A.B.A. Division of Judicial Administration, San Francisco, California, Aug. 9, 1982, at 13 n.14 (estimated 450 state prisoner habeas corpus cases filed with Supreme Court in 1981 term); *see also id.* at 9 n.10 ("During the 1981 Term . . . petitions for certiorari were filed in more than 30 cases by a single prisoner. Each petition . . . became a case on our docket, duplicate copies were sent to each Justice, and each of us had to make a personal decision as to the petition's merit.").

1984, 31% (8,349 out of 26,581). There is widespread support among state and federal judges for reform of this procedure by which the federal district courts in effect engage in appellate review of state criminal cases.

Under current law, a state prisoner who has exhausted state remedies may re-open his case in federal district court by applying for a writ of habeas corpus. This quasi-appellate jurisdiction of the lower federal courts over state criminal judgments has traditionally been the greatest source of friction between the federal and state judiciaries. State judges are naturally resentful of a system that allows a single federal trial judge to review and overturn the considered judgments of state appellate and supreme courts. Federal judges have expressed equally serious concerns over the thousands of frivolous petitions that are filed by state prisoners each year. The practical effect of the system is that a criminal judgment in the United States is never truly final, but is potentially subject to endless re-litigation in federal habeas corpus proceedings.

Pending Administration-supported legislation (S. 238, H.R. 1127) would reduce the number of habeas corpus petitions filed in federal court by state prisoners by setting a time limit for applications, restricting the standard of review for claims that have already been adjudicated by state courts, and tightening rules for consideration of claims not previously raised. This legislation passed the Senate, by a vote of 67 to 9, in 1984 as

S. 1763. We strongly urge that these proposals be promptly enacted.

D. Section 1983 Reform

The tremendous growth in the number of actions under 42 U.S.C. § 1983 -- in both the non-prisoner and prisoner contexts -- also demands congressional scrutiny. In 1960, only 280 suits filed in federal district courts were characterized as "civil rights" actions. We have estimated that for reporting year 1984 § 1983 suits alone accounted for about 28,000 cases in the district courts (about 10% of all civil cases).

Section 1983 was enacted in 1871 as a direct response to the rise of Ku Klux Klan terrorism in the South during Reconstruction, and the general unwillingness or inability of the governments in the former Confederate States to enforce the Reconstruction-era Amendments and their implementating legislation in the face of this pervasive disorder. Originally intended as a narrow civil remedy, § 1983 has ballooned in the last two decades into a major source of federal court litigation, with a scope far beyond anything Congress contemplated in 1871. The 1,492 pages of annotations under 42 U.S.C.A. § 1983 (1981) reflect the enormous range of state and local activity that is now the subject of litigation under § 1983.

The dramatic increase in the scope of § 1983 is the result of several judicial decisions. First, the Supreme Court has held that § 1983 applies to the actions of state officers even where the actions are unsupported by state law, custom and usage and where adequate state law remedies exist. 7/ Thus, § 1983 now covers many wrongs previously actionable only in state tort suits. Second, the Court has held that municipalities are "persons" subject to suit under § 1983 and that a municipality has no "good faith" defense to § 1983 actions. 8/ Third, the Court has construed § 1983 as applicable to federal statutory rights having nothing to do with civil rights or equal protection. 9/ Fourth, the Court has said that even negligently caused injuries may be encompassed by § 1983. 10/ Finally, because exhaustion of state administrative remedies is not a prerequisite to bringing suit under § 1983, 11/ individuals and municipalities often are not given the chance of resolving disputes before cases are filed in federal court.

Significant § 1983 reform would certainly reduce the large number of generally spurious claims that are now brought under that section. We urge that Congress consider the following possible reforms to § 1983:

7/ See Monroe v. Pape, 365 U.S. 167 (1961). But see id. at 225-36 (Frankfurter, J., dissenting) (legislative history shows that § 1983 was not meant to reach acts subject to state remediation).

8/ See Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978), overruling in part Monroe v. Pape, 365 U.S. 167 (1961); Owen v. City of Independence, 445 U.S. 622 (1980).

9/ Maine v. Thiboutot, 448 U.S. 1 (1980).

10/ See Parratt v. Taylor, 451 U.S. 527 (1981).

11/ Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982).

Eliminate § 1983 as a basis for prisoner petitions. This would eliminate a solid majority of § 1983 cases, most of which are frivolous: we estimate that 18,000 (64%) of the approximately 28,000 § 1983 suits filed in 1984 were prisoner suits. It would leave state remedies and a federal remedy under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq*.

Eliminate § 1983 as a basis for negligence claims. The Supreme Court in *Parratt v. Taylor*, 451 U.S. 527 (1981), suggested that a defendant's negligence may amount to a constitutional violation actionable under § 1983. Section 1983 could be amended to preclude liability for negligent acts committed by state or local officials. Alternatively, a higher standard -- *e.g.*, willfulness or recklessness -- could be imposed, since accidents committed by officials are not a proper target of the civil rights laws.

Eliminate § 1983 suits for claims arising under federal statutes not relating to civil rights or equal protection. This would limit § 1983 to claims arising under the Constitution or under federal statutes relating to equal rights, consistent with the original intent of this Reconstruction-era statute, as discussed above.

Provide a good faith defense for municipalities. In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Supreme Court ruled that a municipality is absolutely liable under § 1983 for its constitutional violations regardless of the good faith of its officers. As the dissenting opinion made clear, this conclusion is inconsistent with both the legislative history of § 1983 and Supreme Court precedent. In addition, the rationale that municipal liability will deter constitutional violations is inapposite where the municipality is acting in good faith, even if a court subsequently rules its conduct unlawful. This reform would provide municipalities with the good faith defense now enjoyed by their employees. Since municipalities are liable only for official policies or governmental customs that violate federal law, this would largely protect them from retroactive changes in the law and novel claims.

Prohibit punitive damages, or restrict them to truly egregious cases. In *Smith v. Wade*, 461 U.S. 30, 56 (1983), the Supreme Court suggested that punitive damages are available in a "proper" § 1983 action and that punitive damages may be awarded in such cases "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." As a matter of policy, punitive damages seem out of place in this sort of litigation. The effect of potential punitive damage awards in intimidating public officials in the performance of their duties may outweigh any value they have in deterring constitutional violations. Moreover, the availability of such damages creates an incentive for increased litigation that may impair the ability of the federal courts to address claims that are meritorious. At the very least, punitive damages should only be available upon a showing of improper motive, as suggested by the dissenters in *Wade*.

Require exhaustion of state administrative remedies. Requiring exhaustion of state administrative remedies would be consistent with the aims of § 1983 identified by the Supreme Court in Monroe v. Pape, 365 U.S. 167, 173-74 (1961): (1) to override certain kinds of state laws that are inconsistent with federal law; (2) to provide a federal remedy where the state law is inadequate; and (3) to provide a federal remedy where an adequate state remedy is available in theory but not in practice. Administrative exhaustion is the rule in most other situations where a complaint is made against state action, including habeas corpus cases. At most it would postpone the plaintiff's access to a federal forum -- and it might eliminate the need for recourse to that forum in a substantial proportion of cases.

Require exhaustion of state judicial remedies. Given the increasingly high caliber of the state judiciaries in providing remedies for violations of state and federal law, Congress should also consider requiring plaintiffs first to pursue their cases through the state court system. This would most likely provide relief in meritorious cases without any need for resort to the federal courts. Indeed, because state judicial decisions have res judicata and collateral estoppel effect, [12] plaintiffs would be able to invoke federal court jurisdiction under § 1983 only by showing the absence of an effective remedy under state law (i.e., lack of a comparable state law remedy and lack of state court jurisdiction over § 1983 claims) or the lack of a full and fair hearing in state court. This would achieve the greatest reduction in case filings and would be consistent with the intent of Congress in 1871 to provide a federal remedy only where justice had broken down in state systems.

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[12] Allen v. McCurry, 449 U.S. 90 (1980).

Incorporate the Administration's attorneys' fee cap proposal. Section 1983 plaintiffs who prevail in litigation are entitled to attorneys' fees under 42 U.S.C. § 1988. Unfortunately, as with other fee-shifting statutes, § 1988 provides no statutory standards governing the allowability or amount of fee awards. This results, first, in an increasing incidence of inordinately high attorneys' fees awards through the use of high hourly rates, multipliers, bonuses and other means, which encourages costly and often meritless litigation. Another concern, somewhat related to the first, is the great disparity in awards, which at times borders on the irrational. Perhaps the greatest concern is the growing burden on the courts and litigants imposed by a system in which the rules are unclear and the parties are encouraged to engage in expensive litigation of attorneys' fees issues rather than enter into prompt and inexpensive settlement agreements.

These concerns go far beyond the confines of § 1983, for Congress has enacted well over 100 fee-shifting statutes. To remedy the problems we have observed with all of these various statutes, we believe Congress should impose a $75 per hour fee cap for attorney compensation in litigation under all fee-shifting statutes. Congress should also preclude the use of bonuses and multipliers to augment an award of attorneys' fees under § 1988. Finally, § 1988 should be changed to require specifically (1) that fees may be awarded only for work on issues on which a party prevails on the merits; (2) that fees may be allowed only if the work for which a fee award is sought is necessary to resolve the controversy and the narrow statutory scheme at issue does not preclude an award of attorneys' fees; and (3) that the services for which fees are sought must not be excessive, redundant or otherwise unnecessary.

To implement these recommendations, the Administration has proposed the Legal Fees Equity Act (S. 1580, H.R. 3181), which has already been the subject of hearings before the Senate Judiciary Subcommittee on the Constitution.

E. Social Security Court

There has been broad interest and support in recent years for the creation of an Article I Social Security Court with nationwide jurisdiction to assume the reviewing function in Social Security cases that is currently carried out by the district courts.

Such a reform would bring about a major reduction in the caseload of the Article III courts. The volume of Social Security Act cases has been increasing astronomically: in just five years (1980-1984) it has increased 232%, from 9,043 to 29,985 (11.5% of all civil cases). Under the proposal, these cases would be handled instead by a Social Security Court. The proposed reform would not only reduce the district court caseload but would also significantly further the objective of nationally uniform interpretations of federal law, the same objective that the Intercircuit Panel proposal seeks to promote.

F. Diversity Jurisdiction

Limiting federal diversity jurisdiction would be a particularly effective means of relieving the federal caseload problem. In 1984, diversity jurisdiction accounted for 57,000 new cases. In recent years, diversity cases have generally accounted for about 25 percent of all civil filings, 40 percent of all civil trials, and 60 percent of all civil jury trials in the federal courts. The magnitude of the diversity caseload affects appellate courts as well: about 15 percent of all appeals of district court decisions arise in diversity cases.

While a persuasive case can be made for the elimination of diversity jurisdiction, 13/ reforms short of abolition should also be considered. For example, the historical concerns over bias by state judges and jurors against persons from other states cannot in any way justify allowing in-state plaintiffs the choice of a federal forum. The narrow statutory definition of corporate citizenship allows corporate plaintiffs and defendants to secure federal jurisdiction even where they are licensed to do business in a given state. The current $10,000 minimum amount in controversy was adopted to ensure that minor cases would not find their way into federal court. That minimum, however, was adopted in

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13/ See, e.g., Letter of Assistant Attorney General Robert A. McConnell to Honorable Robert W. Kastenmeier Concerning H.R. 3689-3693 (June 11, 1984).

1958 and inflation over the past 27 years has gradually lowered the effective threshold by 70%. Finally, whole classes of cases, such as automobile accident cases, are the kinds of cases that state court systems have been able to handle without any evidence of bias or unfairness. These cases should be totally eliminated from the federal docket, just as we now exclude other significant classes of state cases -- such as domestic relations cases -- from federal diversity jurisdiction.

Accordingly, we would propose the following diversity reforms:

- Increase the amount in controversy requirement from the current $10,000 to $35,000 (which would account for inflation since the last increase), or to $100,000 or $250,000.
- Deny diversity to in-state plaintiffs.
- Eliminate diversity for auto accident cases.
- Reduce the number of cases by treating corporations as citizens of states where they are licensed to do business.

G. Supreme Court Mandatory Appeals

While the Supreme Court's review jurisdiction has become predominantly discretionary over the past century, statutes remain that require the Court to review any case within broadly defined mandatory appeal categories. The Department of Justice has long supported legislation that would make the Court's docket wholly discretionary, except for direct appeals from three-judge district court panels. 14/ The Court would thereby be relieved of the unnecessary burden of deciding mandatory appeals that do not raise issues of great intrinsic importance and that would not have been granted review if presented as petitions for certiorari.

In the 1983 Term, for example, about 25 appeals set for oral argument would have been eligible for review only by certiorari under this reform. There is no means of determining precisely how many of these cases would have been accepted for discretionary review. However, the Justices have stated that they often find it necessary to call for full briefing and oral argument in mandatory appeal cases of no general public importance on account of the complexity of the legal questions presented. 15/ Since such cases would simply be denied review if presented on certiorari, it is clear that this reform would be of significant value in reducing the Supreme Court's workload, though surely not by itself sufficient to resolve the workload problem.

14/ See, e.g., Letter of Assistant Attorney General Robert A. McConnell to Honorable Peter W. Rodino Concerning H.R. 1968 (September 13, 1983).

15/ See Mandatory Appellate Jurisdiction of the Supreme Court -- Abolition of Civil Priorities -- Juror Rights: Hearing on H.R. 2406, H.R. 4395 and H.R. 4396 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 22-24 (1982) (letter of the Justices to Chairman Kastenmeier).

H. Other Judicial Workload Reduction Proposals

S. 645 in the 98th Congress included two other reform proposals that we have endorsed, and which are strongly supported by the Chief Justice. First, the Chief Justice has proposed that he be authorized to designate a judge to assist him in the administration of the judicial branch. The judge so designated would give up normal judicial duties for a number of years and carry out any administrative functions delegated by the Chief Justice. We support this proposal. We would point out, however, that a judge designated by the Chief Justice to serve in this capacity could not be accorded the status of a member of the Supreme Court because the Constitution expressly reserves the power to appoint Supreme Court Justices to the President with the concurrence of the Senate.

Second, the Chief Justice has advocated the creation of an interbranch Federal Courts Study Commission to carry out a comprehensive study of the operation of the federal courts and to develop a long-term plan for resolving the judicial workload problem. In the recent legislative formulations of the proposal, the Commission would be a fourteen-member body, including four members chosen by the President, four members chosen by the Chief Justice, four members drawn from Congress (a Republican and a Democrat from each House), and two state judges. This proposal has been passed as a separate bill by the Senate without opposition. The Department's comments on S. 645 endorsed this proposal, with the reservation that the ten-year duration of the Federal Courts Study Commission proposed in the legislation should be reduced to three years.

IV. CONCLUSION

Now, having briefly sketched the outlines of the workload crisis facing the Supreme Court and some of the potential legislative responses, let me summarize the Department's position on the particular bill that is before us today.

The general growth of litigation in the federal courts has resulted in a serious workload problem in the Supreme Court. However, a response that only addressed and temporarily accommodated the effects of this litigation explosion would be inadequate. Indeed, it might be counter-productive: it might delay enactment of needed court reforms; moreover, by just adding another court to the federal judiciary, it might simply increase the size of the federal court bureaucracy, thereby threatening the quality of judicial decisions and exacerbating the problem of conflicting precedents. It is therefore essential that the root problems behind the growth in the caseload of the Supreme Court and the lower federal courts be addressed by a broad-based set of reforms.

To do that, Congress must revisit the statutes that have fostered the current litigation explosion. We have today put forth a package of possible court reforms. They include completing the evolution of the Supreme Court's jurisdiction toward discretionary review, limiting diversity jurisdiction, addressing the problem of state prisoner petitions, Section 1983 reform, and establishing an Article I Social Security Court. We believe that these reforms would go a long way toward eliminating the underlying cause of the Supreme Court's caseload crisis -- the burgeoning federal caseload. Therefore, we could endorse the Intercircuit Panel proposal only if Congress makes substantial reforms in these areas. These reforms should be tried before, or at least at the same time as, a structural change of possibly major magnitude like creation of an Intercircuit Panel.

The long and the short of it is that Congress can revisit these statutes now or it can do it later. But we simply cannot continue to live indefinitely with a federal caseload that doubles in less than a decade. Makeshift solutions like creating new courts or new judgeships -- without attention to the underlying causes of the court overload -- only postpone the inevitable. We strongly urge Congress to take action now.

That concludes my prepared statement, Mr. Chairman. I would be happy to answer any questions you and other members of the subcommittee may have.

Question from Senator Howell Heflin

QUESTION: In responding to Senator Kennedy's question in the first hearing on February 4 on the nominees that are sent to the Senate for confirmation, you responded and I quote, "It is our hope and our desire to appoint people from a broad cross-section of the American people. As you know, the appointments to the District Court by tradition and by agreement with this committee come from the nominations by members of the Senate and so we are limited to the pool of those people who are nominated by your colleagues." Further in discussing this question with Senator Kennedy, you continued by saying, and I quote: "The policy has been agreed that the nominations come from the Senate, from the members of the Senate." In a state such as mine, which currently has two Democratic Senators, would your policy be to extend the courtesy to the Democratic Senators to participate in the nomination process?

ANSWER: In accordance with longstanding tradition, and as set forth in the memorandum attached to the March 6, 1981, press release of my predecessor regarding this Administration's procedures for selecting federal district court judges, "[w]ith respect to States with no Senators from the [Republican] party, the Attorney General will solicit suggestions and recommendations from the Republican members of the Congressional delegation, who will act in such instances as a group, in lieu of Senate members from their respective States. It is presumed that Congressional members in such cases would consult with the Democratic Senators from their respective States." A copy of this press release is attached. It would not be unusual, however, for the Department to have informal discussions with Senators of whatever party at various stages of the selection process regarding potential nominees for district court judgeships.

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, MARCH 6, 1981

AG
202-633-2007

Attorney General William French Smith today made public the procedures that will be employed in selecting U.S. District Court judges.

"After discussions with leaders of the Senate and its Committee on the Judiciary," the Attorney General said, "I believe we have established procedures which will ensure that federal judges are chosen on the basis of merit and quality. District Court judges will be selected by the President, in consultation with the members of the United States Senate."

Smith added: "We anticipate utilizing a similar system for the selection of U.S. Attorneys. Procedures for the selection of judges of the Circuit Courts of Appeals are currently under review."

The Attorney General outlined the procedures for selection of District Court judges in a memorandum that was furnished to the Senate leadership on March 2. (A copy of the memorandum is attached.)

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Office of the Attorney General
Washington, D.C. 20530

MEMORANDUM

JUDICIAL SELECTION PROCEDURES

In the process of judicial selection, the Department of Justice will work closely and cooperatively with the Senate leadership, the Judiciary Committee Chairman and individual members. Both the Attorney General, on behalf of the President, and the Senate leadership are firmly committed to the principle that federal judges should be chosen on the basis of merit and quality.

By virtue of the Senators' familiarity with the members of the Bar in their respective States, the Attorney General, in making recommendations to the President for judicial appointments, will invite Republican members to identify prospective candidates for federal district judgeships. Senators are strongly encouraged to submit the names of several candidates, preferably from three to five names, to the Attorney General for a particular vacancy. This information should be shared at the earliest practicable time with the Attorney General's designated representative so that any questions or reservations as to merit or appropriateness of the proposed candidates can be identified sufficiently early to allow meaningful consultation.

Members are encouraged to utilize screening mechanisms to ensure that highly qualified candidates are identified and recommended. Those mechanisms include, but of course are not limited to, advisory groups or commissions charged with the responsibility of assisting in the evaluation and selection of highly capable and experienced candidates. The Attorney General may, when appropriate, make recommendations to Senators with regard to specific judicial candidates.

With respect to States with no Senators from the majority party, the Attorney General will solicit suggestions and recommendations from the Republican members of the Congressional delegation, who will act in such instances as a group, in lieu of Senate members from their respective States. It is presumed that Congressional members in such cases would consult with the Democratic Senators from their respective States.

The Attorney General also desires to receive suggestions with respect to Court of Appeals nominations to be made by the President. The precise means by which such candidates for appointment will be identified by the Department are currently being formulated, but the President's mechanism for judicial selection at the Circuit Court level will include provisions for receiving the recommendations of members of the Senate (or of the appropriate Congressional delegation, in the case of a State with no Republican Senator.)